No. 93-1260-CFY Title: United States, Petitioner
Status: GRANTED v.
Alfonso Lopez, Jr.

Docketed: Court: United States Court of Appeals for
February 2, 1994 the Fifth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Carter,John R.

Entry	Date	Note	Proceedings and Orders
1	Feb 2 1994	G	Petition for writ of certiorari filed.
3	Feb 28 1994		Order extending time to file response to petition until March 24, 1994.
4	Mar 24 1994		Brief of respondent Alfonso Lopez, Jr. in opposition filed.
5	Mar 24 1994	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Mar 30 1994		DISTRIBUTED. April 15, 1994 (Page 16)
7	Apr 1 1994	X	Reply brief of petitioner United States filed.
8	Apr 18 1994		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Apr 18 1994		Petition GRANTED.
			**********
20	Apr 28 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
21	May 10 1994		Record filed.
		*	Original proceedings United States District Court for the Western District of Texas (1 SEALED ENVELOPE).
10	May 12 1994	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	May 23 1994		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	Jun 2 1994		Brief of petitioner United States filed.
13	Jun 2 1994		Brief amici curiae of Center to Prevent Handgun Violence, et al. filed.
14	Jun 2 1994		Brief amici curiae of Children Now, et al. filed.
15	Jun 2 1994		Brief amici curiae of 16 Members of the United States Senate, et al. filed.
16	Jun 2 1994		Brief amicus curiae of Clarendon Foundation filed.
17	Jun 2 1994		Brief amici curiae of National School Safety Center, et al. filed.
18	Jun 2 1994		Brief amici curiae of Academics for the Second Amendment, et al. filed.
19	Jun 2 1994		Brief amici curiae of Ohio, et al. filed.
23	Jun 27 1994		Order extending time to file brief of respondent on the merits until July 19, 1994.
24	Jun 30 1994	D	Motion of Coalition to Stop Gun Violence, et al. for leave to file a brief as amici curiae, out-of-time filed.
25	Jul 18 1994		Brief amicus curiae of Pacific Legal Foundation filed.
26	Jul 19 1994		Brief amici curiae of National Conference of State Legislatures, et al. filed.

No. 93-1260-CFY

Entry	Date	Note	Proceedings and Orders
27	Jul 19 1994		Brief amicus curiae of Texas Justice Foundation filed.
28	Jul 19 1994		Brief of respondent filed.
29	Aug 5 1994		CIRCULATED.
30	Aug 17 1994	X	Reply brief of petitioner filed.
31	Aug 17 1994		SET FOR ARGUMENT TUESDAY, NOVEMBER 8, 1994. (2ND CASE).
32	Sep 26 1994		Motion of Coalition to Stop Gun Violence, et al. for leave to file a brief as amici curiae, out-of-time DENIED.
33	Sep 29 1994	X	Supplemental brief of petitioner filed.
34	Nov 8 1994		ARGUED.

Supreme Court, U.S.
FILED

93 1260 FEB 2 1994

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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12 PP

QUESTION PRESENTED

Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, empowered Congress to enact 18 U.S.C. 922(q) (Supp. IV 1992), which makes it a federal offense to possess a firearm within 1000 feet of a school.

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In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 2 F.3d 1342. The order of the district court (App., *infra*, 55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1993. The court of appeals denied a timely petition for rehearing on November 10, 1993. App., *infra*, 56a-57a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The provisions of 18 U.S.C. 921(a)(25), 921(a)(26), and 922(q) (Supp. IV 1992) are reprinted in the Appendix, *infra*, 58a-60a.

STATEMENT

After a bench trial in the United States District Court for the Western District of Texas, respondent was convicted on one count of possession of a firearm within a school zone, in violation of 18 U.S.C. 922(q) (Supp. IV 1992). He was sentenced to six months' imprisonment, to be followed by two years' supervised release. The court of appeals reversed. App., *infra*, 1a-54a.

1. On March 10, 1992, respondent, then a twelfth-grade student at Edison High School in San Antonio, Texas, arrived at school in possession of a concealed .38 caliber handgun, together with five bullets. In response to an anonymous tip, school officials confronted respondent, who admitted he was carrying the weapon. He explained that an individual he identified as Gilbert had given him the gun to deliver to another individual after school for use in what respondent described as a "gang war." Respondent stated that he was to receive $40 for delivering the weapon. See App., *infra*, 2a.

2. A grand jury indicted respondent for violating 18 U.S.C. 922(q) (Supp. IV 1992), which makes it a federal offense to possess a firearm within 1000 feet of a school zone. Respondent moved to dismiss the indictment, arguing that Section 922(q) is unconstitutional. The district court denied the motion in a brief order, which stated that Section 922(q)

> is a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce, and the "business" of elementary, middle and high schools, as exemplified by the "business" of Edison High School in San Antonio, a public high school organized under the laws of the State of Texas, affects interstate commerce.

App., *infra*, 55a.

Respondent thereafter waived his right to a jury trial and was tried on stipulated evidence. The court convicted respondent and sentenced him to six months' imprisonment, to be followed by two years' supervised release. See App., *infra*, 3a.

3. The court of appeals reversed, rejecting the government's contention that the Commerce Clause, Article I, Section 8, Clause 3, empowered Congress to enact Section 922(q). App., *infra*, 1a-54a. The court acknowledged the "great scope of the commerce power," *id.* at 37a, that "the Supreme Court has consistently deferred to Congressional findings in this respect," *id.* at 40a, and that "Congressional enactments are, of course, presumed constitutional," *id.* at 45a. The court nevertheless ruled that the statute is invalid. The court stated that the interests of the States reflected in the Tenth Amendment support the view "that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion." *Id.* at 46a. In the court's view, the absence of express congressional findings regarding the effect on interstate commerce of the acts proscribed by Section 922(q) required the conclusion that Congress "has not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause." *Id.* at 48a. The court therefore vacated respondent's conviction, holding that "section 922(q), in the full reach of its terms, is

invalid as beyond the power of Congress under the Commerce Clause." *Id.* at 53a.[1]

REASONS FOR GRANTING THE PETITION

The court of appeals has declared a recently enacted federal criminal statute to be unconstitutional, and its decision conflicts with a decision of the Ninth Circuit that expressly rejects the analysis of the court of appeals in this case. The Court's review is warranted.

1. The decision of the court of appeals misapprehends the nature of Congress's authority under the Commerce Clause and the role of the federal courts in discerning the bounds of that authority. As this Court has explained, a statute resting on the Commerce Clause is valid if "Congress had a rational basis for finding that [the regulated activity] affected [interstate] commerce." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). Moreover, the Court has rejected the notion that "Congress need make particularized findings in order to legislate." *Perez* v. *United States*, 402 U.S. 146, 156 (1971); see *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964) (noting, with regard to the statute at issue in *Heart of Atlanta Motel*, that "no formal findings were made, which of course are not necessary"). The Constitution is not a style manual that requires Congress to follow particular drafting rules in order to secure judicial acceptance of its

[1] The court noted that it was "[c]onceivabl[e]" that a conviction under Section 922(q) "might be sustained if the government alleged and proved that the offense had a nexus to commerce." App., *infra*, 53a. The court noted that the parties stipulated that a federal agent was prepared to testify that respondent's gun had been manufactured outside the State of Texas. *Ibid.* Because the indictment failed to allege a commerce nexus, however, the court declined to consider whether a conviction on an indictment containing such an allegation would be sustainable. *Id.* at 53a-54a.

Acts. Accordingly, the appropriate question is whether Congress properly could have found that the actions proscribed by Section 922(q) affect commerce "among the several States."

On that point, the long tradition of federal regulation of firearms activity and Congress's repeated findings regarding the effects of that activity on interstate commerce adequately support the statute at issue here. As the court of appeals explained in great detail, App., *infra*, 9a-36a, Congress for more than half a century has viewed trade in firearms as presenting a national problem and has responded by enacting numerous statutes regulating various aspects of that problem. In several instances, those statutes have imposed obligations that are not dependent on a particularized effect on interstate commerce; their validity rests instead on congressional findings regarding the effect of firearms generally on interstate commerce.[2] The congressional findings that support the validity of those statutes strongly support the validity of the statute at issue here, which proscribes activity with an effect on interstate commerce no less than the effects of the activities regulated by those other statutes (which the court of appeals generally accepted as constitutional, see App., *infra*, 11a-32a). Because we believe that those findings were rational, and that a similar finding in this case would

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[2] See, *e.g.*, 18 U.S.C. 922(a)(1) (federal license required for all firearms dealers); 18 U.S.C. 922(d) (federal offense to transfer a firearm to a disqualified person such as a convicted felon); 18 U.S.C. 922(*o*) (federal offense to possess a machinegun not lawfully possessed before enactment of the provision); 18 U.S.C. 922(p) (federal offense to possess firearms not detectable by typical airport metal detectors); 18 U.S.C. 924(g) (Supp. IV 1992) (federal offense to transfer a firearm knowing that it will be used in a crime of violence or drug trafficking crime); see generally App., *infra*, 12a-32a (discussing the foregoing statutes and the congressional findings that support them).

have been rational, we submit that Section 922(q) is a valid exercise of Congress's commerce power.

2. The decision of the court of appeals warrants review by this Court. Aside from the inherent national importance of any decision that involves "the exercise of the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), the decision conflicts with the Ninth Circuit's recent decision in *United States* v. *Edwards*, No. 93-10058 (Dec. 21, 1993).[3] In *Edwards*, a unanimous panel of the Ninth Circuit rejected the analysis of the Fifth Circuit in this case and held that Section 922(q) "represents a valid exercise of congressional power under the Commerce Clause." Slip op. 14,348. The court concluded that it "disagree[d] with the Fifth Circuit's analysis in *Lopez*," slip op. 14,352, and explained that it believed that the Fifth Circuit's "conclusion is not only squarely contrary to the Supreme Court's holding in *Perez*, it also ignores earlier Supreme Court precedent in *Katzenbach*," slip op. 14,354.[4]

[3] District courts also have reached differing conclusions on the question. Compare *United States* v. *Ornelas*, No. 93-CR-317 (D. Colo. Jan. 12, 1994) (Section 922(q) is constitutional); *United States* v. *Glover*, No. 93-10088-01 (D. Kan. Jan. 12, 1994) (same); and *United States* v. *Holland*, Crim. No. 92-146 (E.D. Pa. Oct. 13, 1993) (same), with *United States* v. *Trigg*, No. 93-10089-01 (D. Kan. Jan. 5, 1994) (Section 922(q) is unconstitutional); and *United States* v. *Morrow*, 834 F. Supp. 364 (N.D. Ala. 1993) (same).

[4] On November 19, 1993, the Senate passed an amended version of a House bill that includes specific findings that the actions proscribed by Section 922(q) affect interstate commerce. Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103d Cong., 1st Sess. § 2972 (*reprinted* as amended by the Senate at 139 Cong. Rec. S17,153-S17,154 (daily ed. Nov. 24, 1993)); see 139 Cong. Rec. S16,301 (daily ed. Nov. 19, 1993) (passage of Act by Senate). The House of Representatives, however, has not enacted a comparable provision. Even if such a provision is enacted into law, however, it will not resolve the conflict in the courts of appeals regarding the validity of prosecutions under the existing statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-5641

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ALFONSO LOPEZ, JR., DEFENDANT-APPELLANT

Sept. 15, 1993

Appeal from the United States District Court
for the Western District of Texas

Before REAVLEY, KING and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

The United States Constitution establishes a national government of limited and enumerated powers. As James Madison put it in *The Federalist Papers*, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, at 292 (C. Rossiter ed. 1961). Madison's understanding was confirmed by the Tenth Amendment. It is easy to lose sight of all this in a day when Congress appropriates trillion-dollar

budgets and regulates myriad aspects of economic and social life. Nevertheless, there are occasions on which we are reminded of this fundamental postulate of our constitutional order. This case presents such an occasion.

Proceedings Below

On March 10, 1992, defendant-appellant Alfonso Lopez, Jr., then a twelfth-grade student attending Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun. Based upon an anonymous tip, school officials confronted Lopez, who admitted that he was carrying the weapon. Although the gun was unloaded, Lopez had five bullets on his person. After being advised of his rights, Lopez stated that "Gilbert" had given him the gun so that he (Lopez) could deliver it after school to "Jason," who planned to use it in a "gang war." Lopez was to receive $40 for his services.

Lopez was charged in a one-count indictment with violating 18 U.S.C. § 922(q), which makes it illegal to possess a firearm in a school zone.[1] After pleading not guilty, Lopez moved to dismiss the indictment on the ground that section 922(q) "is unconstitutional, as it is beyond the power of Congress to legislate control over our public schools." His brief in support of the motion further alleged that section 922(q) "does not appear to have been enacted in furtherance of any of those enumerated powers" of the federal government. The district court denied the motion, concluding that section 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce, and the 'busi-

[1] Initially, state charges were filed against Lopez but those charges were dropped due to the federal prosecution. What Lopez did has been a felony under Texas law since at least 1974. See Tex. Penal Code § 46.04(a) (whoever "with a firearm . . . goes . . . on the premises of a school or an educational institution, whether public or private . . ."); § 46.04(c) (third degree felony).

ness' of elementary, middle and high schools . . . affects interstate commerce." Lopez thereafter waived his right to a jury trial and was tried to the bench upon stipulated evidence. The court found Lopez guilty and sentenced him to six months' imprisonment to be followed by two years' supervised release. Lopez's sole objection to his conviction is his constitutional challenge to section 922(q); he does not otherwise contest his guilt. We now reverse.

Overview

So far as we are aware, the constitutionality of section 922(q), also known as "the Gun-Free School Zones Act of 1990," is a question of first impression in the federal courts.[2] Section 922(q)(1)(A) provides: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[3] Section 922(q)(1)(B) then carves out several limited exceptions, none of which are applicable here.[4] Section

[2] Section 922(q) became law November 29, 1990, as section 1702 of the Crime Control Act of 1990, P.L. 101-647, 101st Cong.2d Sess., 104 Stat. 4789, 4844-45. Its effective date was sixty days later. P.L. 101-647, § 1702(b)(4).

[3] The Act defines a school zone as follows: "(A) in, or on the grounds of, a public, parochial or private school; or (B) within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25). "School" is defined as "a school which provides elementary or secondary education under State law." Section 921(a)(26). Lopez stipulated that Edison High School was and is a school zone.

[4] Section 922(q)(1)(B) provides:

> "(B) Subparagraph (A) shall not apply to the possession of a firearm—
>
> (i) on private property not part of school grounds.
>
> (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtain such a license,

922(q)(2) makes it illegal, again with some exceptions, to intentionally or recklessly discharge a firearm in a known school zone. Section 922(q)(3) disclaims any intent on the part of Congress to preempt state law. Violations are punishable by up to 5 years' imprisonment and a $5,000 fine. 18 U.S.C. § 924(a)(4).

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, ___ U.S. ___, ___, 111

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the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) which is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack which is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities."

Thus, section 922(q)(1), together with section 921(a)(25) & (26) (note 3, *supra*), makes it a federal offense to carry an unloaded firearm in an unlocked suitcase on a public sidewalk in front of one's residence, so long as that part of the sidewalk is within one thousand feet—two or three city blocks—of the boundary of the grounds of any public or private school anywhere in the United States, regardless of whether it is during the school year or the school is in session. In Texas, at least, a tiny church kindergarten would be included. *See United States v. Echevaria*, 995 F.2d 562, 563 & n. 5 (5th Cir. 1993); Tex.Ed. Code Ann. § 21.797 (Vernon Supp. 1993).

S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991). Justice O'Connor's observation is particularly apt in the context of this case, which pits the states' traditional authority over education and schooling against the federal government's acknowledged power to regulate firearms in or affecting interstate commerce. Lopez argues that section 922(q) exceeds Congress' delegated powers and violates the Tenth Amendment.[5] The government counters that section 922(q) is a permissible exercise of Congress' power under the Commerce Clause.[6] In actuality, the Tenth Amendment and Commerce Clause issues in this case are but two sides of the same coin. As Justice O'Connor has explained:

> "In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, ___ U.S. ___, ___, 112 S.Ct. 2408, 2417, 120 L.Ed.2d 120 (1992).

Thus, even if Lopez is correct that section 922(q) intrudes upon a domain traditionally left to the states, it is constitutional as long as it falls within the commerce power. *See Gregory v. Ashcroft*, ___ U.S. at ___, 111 S.Ct. at 2400 ("As long as it is acting within the powers granted it under the

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[5] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

[6] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

Constitution, Congress may impose its will on the States."). This is not to say, however, that the Tenth Amendment is irrelevant to a Commerce Clause analysis. Our understanding of the breadth of Congress' commerce power is related to the degree to which its enactments raise Tenth Amendment concerns, that is concerns for the meaningful jurisdiction reserved to the states. At a more textual level, the Tenth Amendment, though it does not purport to define the limits of the commerce power, obviously proceeds on the assumption that the reach of that power is not *un*limited, else there would be nothing on which the Tenth Amendment could operate.

A good place to begin our analysis is the case of *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). At issue in *Bass* was the felon in possession provision of the Omnibus Crime Control and Safe Streets Act of 1968, which made it unlawful for any felon to "receive[ ], possess[ ], or transport[ ] in commerce or affecting commerce" any firearm. 18 U.S.C. former § 1202(a)(1). Because the "in commerce or affecting commerce" language might be read to apply only to the crime of transporting a firearm, the question for the Court was whether, in pure possession cases, the government had to prove a connection to commerce or whether section 1202 reached the mere possession of firearms. The best evidence for the government's position that the statute reached mere possession without any commerce nexus was the floor statements of Senator Long, who introduced section 1202, and the formal findings contained in Title VII of this 1968 act.[7] While conceding that this legislative history lent "some significant support" for the government's view, *id.* 404 U.S. at 345, 92 S.Ct. at 521, the Court was not convinced.

[7] "Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons . . . constitutes—(1) a burden on commerce or threat affecting the free flow of commerce." 18 U.S.C. § 1201. *See Bass*, 404 U.S. at 345-46 n. 14, 92 S.Ct. at 521 n. 14.

Were section 1202 read to punish mere possession without a commerce nexus, the Court argued, it would intrude upon an area of traditional state authority and would push Congress' commerce power to its limit, if not beyond. Because Congress had not clearly expressed its intent to do so, the Court therefore adopted the narrower construction of the statute:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [Thus] we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* 404 U.S. at 349, 92 S.Ct. at 523 (footnotes omitted).

Significantly, the *Bass* Court noted that "[i]n light of our disposition of the case, we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms." *Id.* 404 U.S. at 339 n. 4, 92 S.Ct. at 518 n. 4. In a subsequent case, the Court held that to satisfy former section 1202's commerce nexus, it need only be shown that the possessed firearm had traveled at some time in interstate commerce. *See Scarborough v. United States,* 431 U.S. 563, 566, 97 S.Ct. 1963, 1965, 52 L.Ed.2d 582 (1977).[8] However, *Scarborough* did not purport to answer the question left open in *Bass*' footnote 4.

The government argues that section 922(q) is no different from a number of other federal firearms crimes. We are not persuaded. With the exception of a few relatively recent, special case provisions, federal laws proscribing firearm pos-

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[8] *See also Barrett v. United States,* 423 U.S. 212, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976) (same under 18 U.S.C. § 922(h) as to felon's *receipt* of firearm previously transported in interstate commerce).

session require the government to prove a connection to commerce, or other federalizing feature, in individual cases. For example, 18 U.S.C. § 922(g), the successor to former section 1202, makes it unlawful for felons and some other classes of persons to "possess [a firearm] in or affecting commerce." Because a commerce nexus is an element of the crime defined by section 922(g), each application of that statute is within the commerce power. *See United States v. Wallace*, 889 F.2d 580, 583 (5th Cir. 1989), *cert. denied*, 497 U.S. 1006, 110 S.Ct. 3243, 111 L.Ed.2d 753 (1990) (holding that section 922(g) "reaches only those firearms that [have] traveled in interstate or foreign commerce and is thus constitutional"). Section 922(q), lacking such a nexus requirement, is not on an equal footing with statutes like section 922(g). The government points to several firearm proscriptions not requiring the specific firearm to have traveled in commerce, such as: 18 U.S.C. § 922(a)(6) (false statement in acquisition of firearm from licensed dealer, manufacturer, or importer); *id.* § 922(b)(1) & (2) (sale or delivery by licensed dealer, manufacturer, or importer to a minor or in violation of state law); *id.* § 922(b)(4) (sale or delivery by licensed dealer, manufacturer, or importer of certain specified weapons, such as machine guns or short-barrelled rifles); *id.* § 922(m) (recordkeeping violations by licensed dealer, manufacturer, or importer). However, not only do all these proscriptions pertain to essentially commercial actions involving the firearms business, as opposed to mere simple possession by any individual, *cf. United States v. Nelson*, 458 F.2d 556, 559 (5th Cir. 1972) ("acquisition of firearms is more closely related to interstate commerce than mere possession"), but each is also expressly tied to the dealer, manufacturer, or importer in question being *federally* licensed. 18 U.S.C. § 921(a)(9), (10) & (11).[9]

[9] It does not seem surprising that those who choose to hold a federal license, or to deal with federal licenses, may be required in reference to

Historical Outline, Federal Firearms Legislation

We now digresss to outline at some length the major developments in the history of presently relevant federal firearms control legislation.

General federal domestic legislation in this area may be traced to two enactments, first, the National Firearms Act of 1934, 48 Stat. 1236-1240, originally codified as 26 U.S.C. § 1132, now codified, as amended, as chapter 53 of the Internal Revenue Code of 1986, 26 U.S.C. §§ 5801-5872, and, second, the Federal Firearms Act of 1938, 52 Stat. 1250, originally codified as former 15 U.S.C. § 901-910, now repealed, the provisions of which, as amended and supplemented, have been carried forward to chapter 44 of Title 18, 18 U.S.C. §§ 921 *et seq.*[10]

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the activities licensed to conform to federal requirements. *See, e.g., Westfall v. United States*, 274 U.S. 256, 47 S.Ct. 629, 71 L.Ed. 1036 (1957) (defrauding a state bank that is voluntarily a member of the Federal Reserve System may be made a federal offense because of that membership); *United States v. Dunham*, 995 F.2d 45 (5th Cir. 1993) (robbery of federally insured state bank); *United States v. Hand*, 497 F.2d 929, 934-5 (5th Cir. 1974), *adhered to en banc*, 516 F.2d 472, 477 (5th Cir. 1975), *cert. denied*, 424 U.S. 953, 96 S.Ct. 1427, 47 L.Ed.2d 359 (1976) (status as federally chartered institution supports federal jurisdiction); *United States v. Fitzpatrick*, 581 F.2d 1221, 1223 (5th Cir. 1978) (federal chartering or federal insurance may each support federal jurisdiction). *See also United States v. Mize*, 756 F.2d 353 (5th Cir. 1985).

[10] We lay to one side, as irrelevant to our inquiry, diverse federal legislation enhancing the penalty for use or possession of a firearm in the commission of some *other federal offense*. The jurisdictional basis of such legislation is obviously that applicable to the underlying federal offense, and the legislation is properly seen as a regulation of the latter. The same reasoning applies even where, as in the case of 18 U.S.C. § 924(c), the firearms provision is treated as a separate offense (rather than a mere sentence enhancement), as its jurisdictional basis is still that of the other federal offense. *See, e.g., United States v. Owens*, 996 F.2d 59, 61 (5th Cir. 1993); *United States v. Young*, 936 F.2d 1050, 1054-55 (9th Cir. 1991); *United States v. Dumas*, 934 F.2d 1387, 1390 (6th Cir.

The National Firearms Act of 1934

The National Firearms Act, applicable only to a narrow class of firearms such as machine guns, "sawed-off" shotguns and rifles, silencers, and the like, 26 U.S.C. § 5845(a),[11] is grounded on Congress' taxing power under Article I, Section 8, Clause 1. *Sonzinsky v. United States,* 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772 (1937); *United States v. Miller,* 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939). Its prohibitions are keyed to the imposition of an excise tax on the business of dealing in such weapons and on transfers of them, together with related requirements for registration of the dealer, the transfers, and the weapons. *See Sonzinsky; Miller, Haynes v. United States,* 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968); *United States v. Freed,* 401 U.S. 601, 602-07, 91 S.Ct. 1112, 1115-1117, 28 L.Ed.2d 356 (1971). However, section 922(q), which concerns us here, has no roots or antecedent in the National Firearms Act, is in no way related or tied to taxation or any character of registration or reporting, and is applicable to all firearms. Accordingly, the National Firearms Act, and its history and development, are essentially irrelevant to our present inquiry, and we turn our attention to the Federal Firearms Act and its successors.[12]

1990), *cert. denied,* ___ U.S. ___, 111 S.Ct. 1119, 113, L.Ed.2d 227 (1991); *United States v. Thornton,* 901 F.2d 738, 741 (9th Cir. 1990). Section 922(q), with which we are here concerned, is not tied or related to any other federal offense. Also put to one side is legislation dealing solely with specific matters such as national defense, foreign relations, foreign commerce, federal facilities, and use of the mails, none of which are related to section 922(q).

[11] *See also* former 26 U.S.C. § 1132(a); *United States v. Miller,* 307 U.S. 174, 175-77 n. 1, 59 S.Ct. 816, 816 n. 1, 83 L.Ed. 1206 (1939); *Haynes v. United States,* 390 U.S. 85, 87-88, 88 S.Ct. 722, 725, 19 L.Ed.2d 923 (1968); *United States v. Anderson,* 885 F.2d 1248, 1250 (5th Cir. 1989).

[12] One might speculate that the 1968 repeal of the Federal Firearms Act and the concomitant incorporation of its proscriptions, as then

The Federal Firearms Act of 1938

The Federal Firearms Act of 1938 applied to all firearms, former 15 U.S.C. § 901(3), and prohibited "any manufacturer or dealer" not licensed thereunder from transporting, shipping, or receiving any firearm or ammunition "in interstate or foreign commerce," *id.* § 902(a), and also prohibited "any person" from receiving any firearm or ammunition "transported or shipped in interstate or foreign commerce in violation of" section 902(a). *Id.* § 902(b). Licensed dealers and manufacturers could ship firearms interstate only to other licensed dealers and manufacturers and to those who had or were not required to have a license under state law to purchase the firearm, *id.* § 902(c). Licensed dealers and manufacturers were required to keep records of firearms transactions. *Id.* § 903(d). It was made an offense for "any person" to ship or transport "in interstate or foreign commerce" any stolen firearm or ammunition, *id.* § 902(g), and for "any person to transport, ship, or knowingly receive in interstate or foreign commerce" any firearm with an altered or removed serial number. *Id.* § 902(i). It was also made unlawful for "any person" to ship or transport "in interstate or foreign commerce" any firearm or ammunition to any felon, person under

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broadened, into the newly enacted chapter 44 of Title 18, as discussed in detail in the text *infra*, were prompted by the Supreme Court's 1968 decision in *Haynes*, which partially invalidated the National Firearms Act on Fifth Amendment, self-incrimination grounds. However, the congressional committee reports on the 1968 legislation do not reflect such a connection, except in respect to Title II of the Gun Control Act of 1968, which amended the National Firearms Act itself to meet the concerns of *Haynes*. P.L. 90-618, § 201, 90th Cong., 2d Sess. (1968); H.R. Conf. Rep. No. 1956, 90 Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4410, 4426, 4434-35. In 1971 in *Freed* the Supreme Court sustained the thus amended National Firearms Act, holding that the *Haynes* problems had been cured.

felony indictment, or fugitive from justice,[13] *id.* § 902(d); and, felons, those under felony indictment, and fugitives, could not "ship" or "transport" any firearm or ammunition "in interstate or foreign commerce." *Id.* § 902(e). Further, felons and fugitives could not "receive any firearm or ammunition that had been shipped or transported in interstate or foreign commerce." *Id.* § 902(f). The latter section included a provision that "possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter." *Id.*[14] In *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), this presumption was held invalid on due process grounds as applied to whether the weapon "was received by" the defendant "in interstate or foreign commerce" after the effective date of the act. *Id.* 319 U.S. at 466, 468, at 1244, 1245.

Omnibus Crime Control and Safe Streets Act of 1968

The Federal Firearms Act remained otherwise in force without significant change until the enactment in June 1968 of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 90th Cong., 2d Sess. (1968) 82 Stat. 197. Title IV (§§ 901-907) of P.L. 90-351 repealed the Federal Firearms Act (*id.* § 907) and enacted a new chapter 44 ("Firearms") of Title 18 (18 U.S.C. § 921-928), which incorporated, with some amendments, almost all the provisions of the Federal

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[13] Fugitive from justice was defined to mean one who had fled any state to avoid felony prosecution or testifying in a criminal proceeding. *Id.* § 901(6).

[14] An analogous presumption applied to possession of a firearm with an altered or removed serial number. *Id.* § 902(i).

Firearms Act,[15] and added further firearms offenses.

Unlike the Federal Firearms Act, this legislation required a federal license "for any person . . . to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition" *even though* the business did not operate in interstate commerce. P.L. 90-351, § 902; 18 U.S.C. § 922(a)(1). *See also id.* § 923(a). The relevant committee report states that new section 922(a)(1) "makes it clear that a license is required for an intrastate business as well as an interstate business. The present Federal Firearms Act (15 U.S.C. § 902(a)) merely prohibits the interstate or foreign shipment or receipt of firearms by a manufacturer or dealer unless he has a license." Sen.Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112 at 2202.[16]

Public Law 90-351 § 901(a) contains, among others, the following express Congressional findings, *viz*:

> "(1) that there is a widespread traffic in firearms moving in or otherwise affecting *inter*state or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power; . . .
>
> (3) that only through adequate Federal control over *inter*state and foreign commerce in these weapons, *and* over *all* persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem

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[15] The presumption considered in *Tot* was dropped, as was the analogous presumption concerning altered serial numbers (see note 14, *supra*).

[16] *See also id.* at 2206 (discussing new section 923(a) "The licensing requirements of the present Federal Firearms Act, 15 U.S.C. § 903(a), are based upon dealers and manufacturers (includes importers) shipping or receiving firearms in interstate or foreign commerce. Here, the requirement is on engaging in business and would also include one engaging in such a business in intrastate commerce").

be properly dealt with, and effective State and local regulation of this traffic be made possible; . . . ." (emphasis added).[17]

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[17] Other findings in section 901 of P.L. 90-351 including the following from section 901(a):

"(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

* * * * *

(4) that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances;

(5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms;

(6) that there is a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior;

* * * * *

(8) that the lack of adequate federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless

These Congressional findings may properly be understood as saying that federal regulation of *all* firearms dealers and manufacturers, not just those conducting an interstate business, was necessary in order to control firearms traffic "moving in or otherwise affecting interstate or foreign commerce." In *Nelson*, 458 F.2d at 559, we quoted the above set-out section 901(a)(3), and observed that "[i]f Congress is to effectively prevent the interstate use of guns for illegal purposes it must control their sources: manufacturers, dealers, and importers."[18] This reasoning from the quoted Congressional findings in support of the requirement that *all* firearms manufacturers and dealers be federally licensed is analogous to the reasoning we employed in *United States v. Lopez*, 459

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persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern; . . . ."

Findings in section 901(b) are as follows:

"(b) The Congress further hereby declares that the purpose of this title is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

[18] *Nelson* upheld a conviction under 18 U.S.C. § 922(a)(6) proscribing false statements to a licensed dealer in acquiring a firearm from the dealer if "material to the lawfulness of the sale" under chapter 44; the false statement was that the defendant had not been convicted of a felony, which was "material to the lawfulness of the sale" in that 18 U.S.C. § 922(d)(1) made it unlawful for a licensed dealer to sell a firearm to a felon, regardless of whether the particular sale had a nexus to interstate commerce. *Id.* at 557-58.

F.2d 949 (5th Cir.), *cert. denied sub nom. Llerena v. United States*, 409 U.S. 878, 93 S.Ct. 130, 34 L.Ed.2d 131 (1972), in sustaining federal regulation of intrastate as well as interstate narcotics traffic. *See id.* at 951-53 (relying on express Congressional findings "that intrastate incidents of the traffic in controlled substances . . . had a substantial and direct effect on interstate commerce" and "swelled the interstate traffic in such substances," that "it was impossible to distinguish between substances manufactured and distributed intrastate from those manufactured and distributed interstate," and thus "that control of the intrastate incidents of traffic in controlled substances was essential to control of interstate incidents of that traffic").

However, it is significant that, apart from the license requirement for all firearms dealers and manufacturers, all the numerous proscriptions of chapter 44 of Title 18, as thus enacted, were expressly tied either to interstate commerce or to the regulation of the conduct of, or dealings with, federally licensed dealers, manufacturers, or importers, or to both. This was true not only for the proscriptions that were carried over from the Federal Firearms Act,[19] but also for the added pro-

[19] The Federal Firearms Act provisions against felons (or indictees or fugitives) shipping or transporting firearms in interstate commerce, 15 U.S.C. § 902(e), against felons (or fugitives) receiving any firearm "which has been shipped in interstate commerce," *id.* § 902(f), and against any person shipping or transporting stolen firearms in interstate commerce or shipping, transporting, or receiving in interstate commerce firearms with altered or obliterated serial numbers, *id.* §§ 902(g) & (i), were carried forward without alteration of the interstate nexus, though with slight other alterations, into respectively 18 U.S.C. § 922(e), 922(f) (persons under felony indictment added; presumption removed); 922(g) and 922(i) (presumption removed). The character of ammunition covered was restricted to that used in destructive devices, such as rockets, bombs, or the like. 18 U.S.C. § 921(a)(4), (16). The provision of the Federal Firearms Act against licensed dealers or manufacturers shipping or transporting in interstate commerce to other than licensed dealers or

scriptions.[20]

In Title VII of P.L. 90-351 Congress also enacted what came to be codified as 18 U.S.C. App. §§ 1201 through 1203 (now repealed). Title VII was added on the Senate floor, "hastily passed, with little discussion, no hearings, and no

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manufacturers where the recipient was required to but did not have a local license, 15 U.S.C. § 902(c), was retained but altered in 18 U.S.C. § 922(a)(2) so that it did not apply to rifles or shotguns but did prohibit almost all interstate shipments by licensed dealers or manufacturers to those who were not licensed dealers or manufacturers.

[20] Added Title 18 provisions with an express interstate commerce nexus include: section 922(a)(3) proscribing transportation or receipt by any non-licensee into or within his state of residence of any firearm "obtained by him outside that State" (except for a shotgun or rifle that he could lawfully possess in his state of residence); section 922(a)(4) forbidding any unlicensed person to "transport in interstate or foreign commerce" any "destructive device" (such as a bomb, missle, or rocket, section 921(a)(4)), machine gun, or "sawed off" shotgun or rifle; section 922(a)(5) forbidding transfer or delivery by a person resident in one state to a person (other than a licensed dealer or manufacturer) resident in a different state of any firearm (other than a rifle or shotgun proper under the laws of the latter state); section 924(b) denouncing whoever "ships, transports, or receives a firearm in interstate or foreign commerce" with intent to commit therewith a felony or knowing or with cause to believe a felony is to be committed therewith.

Added Title 18 provisions with an express nexus to federally licensed dealers or manufacturers include: section 922(b) proscribing firearms transfers by licensed dealers or manufacturers to minors (except for shotguns or rifles) (1), or where local law in the state of transfer forbids possession by the transferee (2), or where the transferee resides in another state (except for shotguns or rifles) (3), or of "destructive devices" (bombs, missiles, etc.) or machine guns or "sawed-off" shotguns or rifles (4), in all cases except for transfers to other licensed dealers or manufacturers; section 922(a)(6) forbidding false statements to licensed dealers in acquisition of firearms that are material to the lawfulness under chapter 44 of the acquisition; and section 922(c) forbidding transfer by a licensed dealer or manufacturer to a felon, fugitive from justice, or one under felony indictment.

report," and "never received committee consideration in" either chamber. *Bass*, 404 U.S. at 344 & n. 11, 92 S.Ct. at 520 & n. 11. Section 1202(a) criminalized any felon (or person discharged other than honorably from the Armed Forces, or adjudged a mental incompetent, or who had renounced United States citizenship, or was an alien unlawfully in the country) "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm." Section 1201 contained Congressional findings "that the receipt, possession, or transportation of a firearm by felons" (and by the other categories of persons covered by section 1202(a)) "constitutes (1) a burden on commerce or threat affecting the free flow of commerce," and "a threat to the safety of the President . . . and Vice-President" and to the continued effective operation of the federal and all state governments, and "an impediment or a threat" to the exercise of First Amendment rights. In the Firearms Owners' Protection Act of 1986, P.L. 99-308, 99th Cong., 2d Sess., 100 Stat. 449, other aspects of which we consider in more detail below, *all* of Title VII (including section 1201 and all its findings) was repealed, P.L. 99-308, § 104(b), and most of the substantive provisions of Title VII (*e.g.*, §§ 1202 & 1203) were essentially incorporated into section 922. P.L. 99-308, § 102.

Gun Control Act of 1968

In October 1968, Congress enacted the Gun Control Act of 1968, P.L. 90-618, 90th Cong., 2d Sess., 82 Stat. 1213. Title I of this legislation reenacted all of chapter 44 of Title 18 (§§ 921-928), but with what are for present purposes essentially only minor changes from the version thereof enacted earlier that year by Title IV of the Omnibus Crime Control And Safe Streets Act of 1968.[21] Among these changes were, for

[21] Title II of P.L. 90-618 amended the National Firearms Act at least in part to eliminate the Fifth Amendment self-incrimination problems that the Supreme Court had found in *Haynes*. *See* note 12, *supra*.

example, removal or narrowing of most of the exemptions that Title IV had made for rifles and shotguns (see note 20, *supra*, and note 23, *infra*), additional coverage of transactions in ammunition in certain instances where Title IV dealt only in firearms, and adding unlawful users of federally regulated narcotics and adjudicated mental defectives to felons, fugitives, and indictees as persons concerning whom certain firearms transactions were prohibited.[22] Title I also added certain new prohibitions on licensees, including a new section 922(c) prohibiting licensees from selling firearms to those who are not licensees unless the purchaser either appeared in person on the licensee's premises or furnished a sworn statement as to his eligibility and seven days' notice was given the chief law enforcement officer of the transferee's residence prior to delivery or shipment. Other provisions relaxed some of the restrictions of Section 922(a)(3) & (5) as enacted by Title IV of P.L. 90-351.[23] In sum, the Gun Control Act of 1968 main-

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[22] As enacted by Title IV of P.L. 90-351, section 922(c) prohibited a licensee from selling or disposing of a firearm to a felon, fugitive, or indictee, section 922(e) prohibited any such individual (felon, etc.) from shipping or transporting a firearm in interstate or foreign commerce and section 922(f) denounced any such individual (felon, etc.) who received any firearm that had been shipped or transported in interstate commerce. Title I of P.L. 90-618 shifted these sections to, respectively, section 922(d), (g), and (h), and added to the disqualified individuals adjudicated mental defectives and unlawful users or addicts of various federally controlled drugs. No change was made in the provisions for nexus to interstate or foreign commerce or to a federal licensee.

[23] As enacted by P.L. 90-351, section 922(a)(3) prohibited transport or receipt by a non-licensee into or within his state of residence of any firearm (except for a shotgun or rifle he could lawfully possess in his state of residence) "obtained by him outside that state." P.L. 90-618 revised section 922(a)(3) to narrow the shotgun or rifle exception and to add an exception for firearms acquired by testate or intestate succession. As enacted by P.L. 90-351, section 922(a)(5) prohibited non-licensees from transferring any firearm (other than a rifle or shotgun) to a non-

tained the same essential jurisdictional bases of the earlier 1968 legislation, namely—apart from the license requirement for all dealers and manufacturers—an express nexus either to interstate commerce or to the conduct of, or dealings with, federally licensed dealers or manufacturers, or to both. The legislative history is consistent with this approach.[24] The House committee report explains the purpose of the Gun Control Act of 1968 (which originated as H.R. 17735) in relevant part as follows:

"PURPOSE

The principal purpose of H.R. 17735, as amended, is to strengthen Federal controls over *inter*state and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders.

* * * * *

GENERAL STATEMENT

The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to

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licensee resident "in any State other than that in which the transferor resides." P.L. 90-618 revised section 922(a)(5) to eliminate the shotgun or rifle exception and to add exceptions for transfers by testate or intestate succession and for temporary loans "for lawful sporting purposes." In both section 922(a)(3) and section 922(a)(5) the revisions of P.L. 90-618 retained the jurisdictional basis of the prior sections, namely out-of-state acquisition or disposition to a resident of a different state.

[24] An exception to this was the addition by P.L. 90-618 of a new section 924(c) (and the concomitant renumbering of the former section 924(c)) [*sic*] enacted by P.L. 90-351 as section 924(d)) providing that any person who used a firearm to commit (or unlawfully carried a firearm during the commission of) "any felony which may be prosecuted in a court of the United States" "shall be sentenced to" one to ten years' imprisonment. While this did not rely for jurisdictional purposes on either interstate commerce or the involvement of a federally licensed party, it was obviously based on the same federal jurisdictional footing as that on which the underlying felony rested. See note 10, *supra*.

a need to strengthen Federal regulation of *inter*state firearms traffic.

The subject legislation responds to wide-spread national concern that existing Federal control over the sale and shipment of firearms [across] *State lines* is grossly inadequate.

Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today.

* * * * *

The committee is persuaded that the proposed legislation imposes much needed restrictions on *inter*state firearms traffic and, at the same time, does not interfere with legitimate recreational and self-protection uses of firearms by law-abiding citizens. The committee urges its enactment." H.R.Rep. No. 1577, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4410 at 4411-13, 4415 (emphasis added).

Firearms Owners' Protection Act of 1986

This basic jurisdictional structure—the licensing of all firearms dealers and manufacturers, based on Congress' express finding (in the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, § 902(a)(3)) to the effect that such was necessary to adequate federal control of interstate and foreign commerce in firearms, and in all other instances an express nexus either to interstate commerce or to the activity of, or dealings with, federally licensed dealers or manufacturers, or to both[25]—has continued to the present, with only a few,

[25] As observed in Note 24, *supra*, there was in section 924(c) (using or carrying a firearm in a federal felony) the separate jurisdictional basis of the underlying federal offense. In 1984, section 924(c) was amended to

discrete excpetions, the first of which arose in 1986, in the Firearms Owners' Protection Act, P.L. 99-308, 99 Cong., 2d Sess., 100 Stat. 449-461.

Section 102(5)(A) of the Firearms Owners' Protection Act, 100 Stat. 451-52, amended section 922(d), as explained in the relevant committee report, "by extending the prohibition on transferring firearms to disqualified persons [*e.g.*, felons, fugitives, etc.] from only licensees to private individuals as well." H.R.Rep. No. 99-495, 99 Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 1327 at 1341. The explanation for this particular amendment appears in an "assessment" of the bill by the Bureau of Alcohol, Tobacco and Firearms (BATF) that ap-

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make the penalty additional to that for the underlying federal offense, to eliminate the element of "unlawfully" from the carrying branch of the offense, and to describe the underlying federal offense as "any crime of violence" (instead of "any felony") "for which he may be prosecuted in a court of the United States." P.L. 98-473, § 1005, 98th Cong., 2d Sess., 98 Stat. 1837, 2138-39. At the same time 18 U.S.C. § 929(a) was enacted providing enhanced punishment for whoever uses or carries a "handgun" loaded with "armor piercing ammunition" during or in relation to "the commission of a crime of violence . . . for which he may be prosecuted in a court of the United States." P.L. 98-473, § 1006, 98 Stat. 2139.

In 1986, in the Firearms Owners' Protection Act, P.L. 99-308, §§ 104(a)(2) & 108, 99th Cong., 2d Sess., 100 Stat. 449, 456-57, 460, §§ 924(c) and 929(a) were amended to add to "crime of violence" any "drug trafficking crime" as occasions on which use of a firearm was prohibited; nevertheless, the offense still had to be one (as it does today) "for which he may be prosecuted in a court of the United States" (§ 924(c)(1); § 929(a)(1)). Also, "drug trafficking crime" was (and is) defined so as to limit it to federal felonies (§ 924(c)(2); § 929(a)(2)); and "crime of violence" was (and is) defined, but its definition did not itself require a federal element (§ 924(c)(3)).

Later in 1986, in P.L. 99-408, § 8, 99th Cong., 2d Sess., 100 Stat. 920, 921, the "handgun" reference in section 929(a) was changed to "firearm," but the jurisdictional basis ("for which he may be prosecuted in a court of the United States") of section 929(a) was not altered.

pears in full as a part of this committee report, and states "This proposal would close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." *Id.* 1986 U.S.C.C.A.N. at 1343.[26] This amendment to section 922(d) does not render it analogous to section 922(q), which is presently before us. To begin with, section 922(d) deal with transfers, not mere possession, and, as we said in *Nelson*, "acquisition of firearms is more closely related to interstate commerce than mere possession." *Id.* 458 F.2d at 559. Moreover, the above quoted legislative history indicates that Congress determined that regulation of all transferors to disqualified persons, not just federal licensee transferors, was necessary to prevent evasion of the regulation of federal licensees (a regulation with independent legitimacy, see note 9, *supra*). This is consistent with the approach we took in *Lopez* in sustaining federal regulation of intrastate, as well as interstate, narcotics trafficking. *Id.* 459 F.2d at 951-53. *See also Nelson*, 458 F.2d at 559 (relying on Congressional finding in P.L. 90-351, § 901(a)(3), and observing that "[i]f Congress is to effectively prevent the interstate use of guns for illegal purposes it must control their sources: manufacturers, dealers and importers"). Finally, the overall structure and

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[26] This portion of the BATF assessment reads in full:

> "2. *Sales to Prohibited Persons.* This bill makes it unlawful for any person, not only licensees, to sell or otherwise dispose of firearms to certain prohibited categories of persons, e.g., a convicted felon. Under existing law it is only unlawful for a licensee to sell or otherwise dispose of firearms knowing or having reasonable cause to believe that such a person is in a prohibited category. This proposal would close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." *Id.*

This amendment to section 922(d) also added to the list of disqualified persons illegal aliens and those who had been dishonorably discharged or had renounced United States citizenship.

history, as well as the title, of the Firearms Owners' Protection Act suggest no Congressional determination that mere possession of ordinary firearms implicates interstate commerce or other federal concerns. Indeed, Congress in that legislation expressly found, *inter alia*, "that (1) the rights of citizens—(A) to keep and bear arms under the second amendment to the United States Constitution; . . . ; and (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies." P.L. 99-308 § 1(b).[27]

Further, this legislation amended several provisions of section 922 and section 924 that contained express interstate commerce nexus requirements without diluting those requirements. This was true, for example, with respect to the amend-

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[27] The full text of P.L. 99-308 § 1, 100 Stat. 449, is as follows:

"(a) SHORT TITLE—This Act may be cited as the "Firearms Owners' Protection Act'.

(b) CONGRESSIONAL FINDINGS—The Congress finds that—

(1) the rights of citizens—

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes'."

ments to section 922(g), prohibiting felons (and other disqualified persons) from shipping or transporting any firearms "in interstate or foreign commerce," from receiving any firearm "which has been shipped or transported in interstate or foreign commerce" and, as added by the amendment, from possessing any firearm "in or affecting commerce." P.L. 99-308 § 102(6). As we explained in *Wallace*, 889 F.2d at 583, the legislative history of this amendment clearly showed that the phrase "in or affecting commerce" meant "interstate" commerce, and that accordingly the possession offense of thus amended section 922(g) "reaches *only* those firearms that traveled in interstate or foreign commerce and is *thus* constitutional." (Emphasis added). Similarly, the legislation enacted a new section 922(n), P.L. 99-308 § 102(8), which proscribed those under felony indictment—whom the same legislation removed from sections 922(g) and (h)—from shipping or transporting any firearm "in interstate or foreign commerce" and from receiving any firearm "which has been shipped or transported in interstate or foreign commerce."[28] Also, the express federal nexus was retained where the Firearms Owners' Protection Act amended sections 924(c) and 929(a) to add "drug trafficking crime" to the offenses concerning which firearm (or certain ammunition) use was proscribed, while retaining the requirement that the offense in any event be one that could "be prosecuted in a court of the United States." See note 25, *supra*. Similarly, the amendment made to section 922(a)(3), concerning a non-licensee's transportation into or

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[28] As previously observed, these amendments repealed former 18 U.S.C. § 1202 and incorporated the provisions of former section 1202 into sections 922(g) and (n). Prior to the amendment, sections 922(g) and (h) had not applied to possession as such, but had included those under felony indictment, while section 1202(a) included possession "in commerce or affecting commerce" but did not include those under felony indictment.

receipt within his state or residence of a firearm "obtained by such person outside that state" broadened to all types of firearms an exception previously limited to shotguns and rifles, but retained the "obtained by such person outside that state" language. P.L. 99-308 § 102(3). Likewise, the restriction on licensed dealer sales to non-residents of the state of the licensee's business location was amended but without altering the interstate character of the subject matter. *Id.* § 102(4). And, the legislation left unchanged other provisions of section 922 expressly requiring an interstate commerce nexus, such as, for example, section 922(a)(5), generally prohibiting non-licensee transfers of firearms to other non-licensees residing in a state other than that of the transferor's residence.

The other Firearms Owners' Protection Act change relevant in this connection is its section 102(9), 100 Stat. 452-53, adding a new section 922(*o*) making it unlawful for "any person to transfer or possess a machine gun" except for any "lawfully possessed before the date this subsection takes effect." There is no committee report, and sparse legislative history, concerning this provision, as it was added on the House floor. The only apparent explanation for it is the statement of its sponsor, Representative Hughes, that "I do not know why anyone would object to the banning of machine guns." *See Farmer v. Higgins*, 907 F.2d 1041, 1044-45 (11th Cir. 1990). While section 922(*o*) is a closer parallel than others to section 922(q) presently before us, as both sections denounce mere possession with no express tie either to interstate commerce or other federalizing element, we decline to read into section 922(*o*) any implied Congressional determination that possession of firearms generally, or within one thousand feet of any school grounds, affects interstate commerce. Section 922(*o*) is restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported *after* enactment of the Firearms Owners'

Protection Act,[29] which is more suggestive of a nexus to or affect [*sic*] on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within one thousand feet of the grounds of any school.

The only two circuit courts that have addressed a constitutional challenge to section 922(*o*), *United States v. Hale*, 978 F.2d 1016, 1018 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1614, 123 L.Ed.2d 174 (1993); *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991), have sustained it in reliance on Congressional findings that appear to us to be inapplicable in the present context, whatever relevance they might have to section 922(*o*).[30] *Hale* states that, "The legislative history of section 922(*o*) indicates that Congress considered the relationship between the availability of machine guns, violent crime, and narcotics trafficking. *See* H.R.Rep. No. 495, 99th Cong., 2d Sess., at 1-5, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1327-31." *Id.* at 1018. The only portion of the cited passage of the H.R.Rep. No. 495 that relates to machine guns—and it will be recalled that neither section 922(*o*) nor anything comparable to it was included in the bill (H.R. 4332) there being considered—is a discussion of the history of the legislation, including various earlier bills that did not become law. One of the earlier bills discussed was H.R. 3135, introduced August 1, 1985, and H.R.Rep. No. 495 observes that H.R. 3135 "prohibited the transfer and possession of machine guns, used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the

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[29] The grandfather clause in section 922(*o*)(2)(B) applies only to machine guns "lawfully" possessed before enactment; nevertheless, with respect to those possessed earlier but unlawfully there would be a jurisdictional nexus in the federal law making that earlier possession unlawful, such as the National Firearms Act or various provisions of chapter 44 of Title 18.

[30] *Farmer* did not address the validity of section 922(*o*).

proceeds of crime. The bill allowed possessors of lawfully registered machine guns to continue their lawful possession." 1986 U.S.C.C.A.N. at 1330. Whatever this may say about machine guns, it says nothing about the mere possession of ordinary firearms. Given the formal Congressional findings contained in the Firearms Owners' Protection Act (see note 27, *supra*), which avow a purpose to enhance Second and Tenth Amendment rights and express solicitude for the freedom of citizens to possess ordinary firearms, it would be entirely inappropriate to consider the above-quoted portions of the committee report as having any relevance beyond machine guns and similar destructive weapons.[31]

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[31] *Hale* also states: "When it first enacted section 922, Congress found facts indicating a nexus between the regulation of firearms and the commerce power. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, 82 Stat. 197, 225 (1968)." *Id.* 978 F.2d at 1018. The citation given is to the findings in section 901(a) of P.L. 90-351, in connection with Title IV thereof. As previously discussed, those findings (set out in note 17 and accompanying text, *supra*), and that enactment, with one exception, do no more than speak to the need to regulate both interstate (and foreign) commerce in firearms and federally licensed dealers, the one exception is the finding that for *this* purpose it is necessary to require intrastate, as well as interstate, dealers to be federally licensed. There is nothing to suggest any finding that mere private party *intra*state possession of firearms that have not moved in interstate commerce has any effect on interstate commerce or must be regulated in order to effectively regulate interstate commerce.

In *Evans* the court stated:

> "Congress specifically found that at least 750,000 people had been killed in the United States by firearms between the turn of the century and the time of the Act's enactment. It was thus reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry. Since Evans does not contend that any specific Constitutional rights are implicated, this rather tenuous nexus between the activity regulated and interstate commerce is sufficient." *Id.* 928 F.2d at 862.

The Congressional finding alluded to is not contained in the Firearms Owners' Protection Act, and the only similar finding we can locate is that

Section 922(*o*) is not before us, and we intimate no views as to it. However, we do not regard *Hale* and *Evans* as persuasive respecting either the validity of section 922(q) or the existence of express or implied Congressional findings supportive thereof.

The Undetectable Firearms Act of 1988

We note two firearms provisions enacted in 1988. The Undetectable Firearms Act of 1988, P.L. 100-649, 100th Cong., 2d Sess., 102 Stat. 3816, added to Title 18 § 922(p) making it unlawful for any person to "manufacture, import, ship, deliver, possess, transfer, or receive" any firearms either not as detectable "by walk-through metal detectors" as an exemplar to be developed by the Secretary of the Treasury or which "when subjected to inspection by the type of x-ray machines commonly used at airports, does not generate an image that

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contained in H.Rep. No. 1577 in reference to H.R. 17735, which became the Gun Control Act of 1968. See H.Rep. No. 1577, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4410 at 4411-15. We have quoted this language in the text, *supra*, in our discussion of that legislation. Nothing in this committee report mentions insurance or suggests that mere *intra*state possession of firearms that have not moved in interstate commerce has any affect on interstate commerce or must be regulated in order to effectively regulate interstate commerce. The committee states that "the proposed legislation imposes much needed restrictions on *inter*state firearms traffic," *id.* at 4415 (emphasis added), and that there is "a need to strengthen Federal regulation of *inter*state firearms traffic." *Id.* at 4412 (emphasis added). This is consistent with what the legislation did, and it did not (apart from continuing the requirement of the Omnibus Crime Control and Safe Streets Act that intrastate, as well as interstate, dealers be federally licensed) purport to regulate mere private party possession of firearms that had not moved in interstate commerce.

We thus disagree with the general statements in *Hale* and *Evans* respecting the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968.

accurately depicts the shape of" any major component thereof. Section 922(p)(1). Exempted were "any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment" of the act. Section 922(p)(6). Although there is no express requirement of an interstate nexus for the section 922(p) possession offense, we reject the government's argument that this legislation is analogous to section 922(q). Section 922(p)'s employment of the standard of "x-ray machines commonly used at airports" plainly reflects the act's interstate commerce related purpose and nexus. This is confirmed by the legislative history, as the relevant committee report notes "the threat posed by firearms which could avoid detection at security checkpoints: airports, government buildings, prisons, courthouses, the White House." H.R.Rep. No. 100-612, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 5359.[32]

Anti-Drug Abuse Amendments Act of 1988

The other 1988 firearms legislation is subtitle G (§§ 6211-6215) of Title VI ("Anti-Drug Abuse Act of 1988, P.L. 100-690, 100th Cong., 2d Sess., 102 Stat. 4181, 4359-62. Subtitle G added to Title 18 sections 924(f) and (g) and 930. P.L. 100-690, §§ 6211, 6215. Section 924(g) denounces "[w]hoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection

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[32] Moreover, section 922(p) applies only to non-detectable firearms manufactured in or imported into the United States after its November 10, 1988, enactment, which is suggestive of a closer relation to commerce than mere possession of any firearm whenever and wherever made. Section 922(p)(6). The cited committee report also observes that "No firearms currently manufactured in the United States are known to be subject to the proposed prohibitions." *Id.* 1988 U.S.C.C.A.N. 5359 at 5363.

(c)(2))." There is no requirement that the transfers have an interstate character or that the firearms have been in interstate commerce. While "drug trafficking crime" is limited to federal offenses—and this limitation was maintained even though the same legislation slightly amended the definition thereof in section 924(c)(2) and section 929(a)(2)[33]—"crime of violence" is not so limited. Section 924(c)(3). Our attention has not been called to legislative history suggesting an explanation for this seeming anomaly.[34] It seems anomalous in several respects.

There is no apparent reason why the drug trafficking crime must be federal, but not the crime of violence. Further, no amendment was made to section 924(b), denouncing the shipment, transport, or receipt of a firearm "in interstate or foreign commerce" with "knowledge or reasonable cause to believe that" a felony "is to be committed therewith"; nor to section 924(c)(1) denouncing use or carrying of a firearm during or in relation to "any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States."[35] The seemingly unusual result is that anyone

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[33] P.L. 100-690, § 6212, 102 Stat. 4360.

[34] The 1988 U.S.C.C.A.N. states respecting the Anti-Drug Abuse Act of 1988 that "No Senate or House Report was submitted with this legislation." *Id.* at 5937. New section 924(g) was applied in a "crime of violence" context in *United States v. Callaway*, 938 F.2d 907 (8th Cir. 1991), which observes that it "was designed to curb the supply of firearms used in the commission of drug related and violence crimes," but cites no legislative history. *Id.* at 909. *Callaway* does not address the validity of section 924(g), its relationship to the regulation of interstate commerce, or any express or implied Congressional findings related thereto, nor whether the offense there had an interstate or other jurisdictional nexus (though the facts received suggest none).

[35] Nor to section 929(a)(1) denouncing possession of armor piercing ammunition during or in relation to "a crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States."

who transfers intrastate a firearm (which has not been in interstate commerce) knowing it will be used in a crime of violence in that state commits a federal crime even though the crime of violence is not a federal offense, but the party perpetrating the crime of violence with the firearm in that same state violates federal law *only* if the crime of violence one "for which he may be prosecuted in a court of the United States." A possible inference from this is that transfer is deemed more related to the regulation of interstate commerce than mere use or possession. *Cf. Nelson,* 458 F.2d at 559 ("acquisition of firearms is more closely related to interstate commerce than mere possession").[36]

The 1988 legislation, like that before it, demonstrates neither a pattern of regulation that abjures any express nexus to interstate commerce or other federal element nor any express or implied Congressional finding about mere possession of ordinary firearms absent such a nexus.

Crime Control Act of 1990

At long last, we turn to the Crime Control Act of 1990, P.L. 101-647, 101st Cong., 2d Sess., 104 Stat. 4789-4968, which included, as part of its XVII ("General Provisions"), section 1702, 104 Stat. 4844-45, the Gun-Free School Zone Act of

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[36] We also observe that the other additions to chapter 44 of Title 18 made by subtitle G of Title VI of the Anti-Drug Abuse Act of 1988 expressly provided for an interstate commerce or other federal nexus. Thus, new section 924(f), P.L. 100-960, § 6211, 102 Stat. 4359, denounces whoever "travels from any State or foreign country into any other State" and acquires or transfers "a firearm in such other State" with the purpose of engaging in conduct constituting any of various offenses including "a crime of violence (as defined in subsection (c)(3))." New section 930, P.L. 100-960, § 6215, 102 Stat. 4361, denounces "whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility."

1990, that enacted the new section 922(q).[37] Preliminarily, we note that the Crime Control Act of 1990 also contained a Title XXII ("Firearms Provisions"), P.L. 101-647, § 2201-2205, 104 Stat. 4856-58, which revised other portions of chapter 44 of Title 18. These other revisions all retained or provided for an express interstate commerce (or other federal jurisdiction) nexus for the various Title 18, chapter 44, offenses the provisions of which were being amended.[38]

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[37] Section 1702 also added to section 921(a) new subsections (25), (26), and (27) defining terms used in new section 922(q) ("school zone," "school," and "motor vehicle") and added to section 924(a) new subsection (4) fixing the penalty for violation of new section 922(q).

[38] Public Law 101-647 § 2201 amended section 922(a)(5), which formerly proscribed (with exceptions) transfer of a firearm by a nonlicensee to a nonlicensee who "resides in any state other than that in which the transferor resides" (or that in which the place of business of the transferor, if a business entity, is located) so that it proscribed (with the same exceptions) such a transfer if the nonlicensee transferee "does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides." The purpose of this was apparently to include among disqualified transferees "an alien or transient who does not reside in the State in which the transferor resides." H.Rep. No. 101-681(I), 101st Cong., 2d Sess., at 106, *reprinted in* 1990 U.S.C.C.A.N. 6472 at 6510. It also appears to have the effect of clarifying section 922(a)(5) by removing its otherwise arguable prohibition of transfer to a nonlicensee business entity having a place of business in the transferor's state of residence but existing under the laws of and having its principal place of business in a different state.

Also, Public Law 101-647 § 2202(a) amended section 922(j), which prohibited any person from receiving, concealing, disposing of, pledging, or accepting as security any stolen firearm "moving as, which is a part of, or which constitutes, interstate or foreign commerce," by expanding it to also cover any stolen firearm "which has been shipped or transported in, interstate or foreign commerce." H.Rep. No. 101-681(i), *supra*, explains that the amendment will "permit prosecution . . . where

Gun-Free School Zones Act of 1990

The Gun-Free School Zones Act of 1990, now section 922(q), was introduced in the Senate by Senator Herbert Kohl as S. 2070 and a virtually identical bill with the same title was introduced in House by Representative Edward Feighan as H.R. 3757. The Senate version was eventually enacted as part of Title XVII of the Crime Control Act of 1990, P.L. 101-647 § 1702, 104 Stat. 4844-45. The House Report accompanying the Crime Control Act broadly declares that the intent of the Crime Control Act was "to provide a legislative response to various aspects of the problem of crime in the United States." H.R.Rep. No. 101-681(I), 101st Cong., 2d Sess. 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6473. However, this report makes no mention whatsoever of the impact upon commerce of firearms in schools. Nor does the report even mention the Gun-Free School Zones Act. Although S. 2070

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the firearms have already moved in interstate or foreign commerce." *Id.* at 106, 1990 U.S.C.C.A.N. at 6510.

Further, Public Law 101-647 § 2202(b) amended section 922(k), which made it unlawful "to transport, ship or receive, in interstate or foreign commerce" any firearm whose serial number had been removed, altered, or obliterated, by expanding it to also make it unlawful "to possess or receive" any such firearm that "has, at any time, been shipped or transported in interstate or foreign commerce."

And, Section 2204 of P.L. 101-647 added section 922(r) making it "unlawful for any person to assemble from imported parts" any rifle or shotgun "identical" to any "prohibited from importation under section 925(d)(3)." House Report 101-68(I), *supra*, reflects that this amendment "is to prevent the circumvention of the importation restrictions by persons who would simply import the firearms in a disassembled form and then reassemble them in the United States." *Id.* at 107, 1990 U.S.C.C.A.N. at 6511.

Finally, section 2205 of P.L. 101-647 amended section 930, which denounced possession of firearms "in a Federal facility," so that an enhanced penalty would be applicable if the possession were "in a Federal court facility."

has no formal legislative history that we know of, a House subcommittee hearing was held on H.R. 3757. Witnesses told this subcommittee of tragic instances of gun violence in our schools, but there was no testimony concerning the effect of such violence upon interstate commerce. Indeed, the noticeable absence of any attempt by Congress to link the Gun-Free School Zones Act to commerce prompted the Chief of the Firearms Division of the BATF and the BATF's Deputy Chief Counsel, to testify as follows:

> "Finally, we would note that the source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against possession of firearms by felons, mental incompetents and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, and the unlawful acts specifically included a commerce element." *Gun-Free School Zones Act of 1990:* Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 101st Cong., 2d Sess., at 100 (1990) (statement of Richard Cook and Bradley Buckles) (hereinafter, House Hearings).

Although both the House and Senate sponsors of the Gun-Free School Zones Act made fairly lengthy floor statements about it, neither congressman had anything to say about commerce in their remarks. *See* 136 Cong.Rec. S17595 (1990) (statement of Sen. Kohl); 136 Cong.Rec. S766 (1990) (same); 135 Cong.Rec. E3988 (1989) (inserted statement of Rep. Feighan).

The failure of section 922(q) to honor the traditional division of functions between the Federal Government and the States was commented upon by President Bush when he signed the Crime Control Act of 1990:

"I am also disturbed by provisions in S. 3266 that unnecessarily constrain the discretion of State and local governments. Examples are found in Title VIII's 'rural drug enforcement' program; in Title XV's 'drug-free school zones' program; and in Title XVIII's program for 'correctional options incentives.' *Most egregiously, section 1702 inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law.* The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress." Statement by President George Bush upon Signing S. 3266, 26 Weekly Comp.Pres.Doc. 1944 (Dec. 3, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6696-1 (emphasis added).[39]

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[39] Rep. William Hughes, the Chairman of the Subcommittee on Crime of the House Judiciary Committee, made the same point in a colloquy with Richard Cook, the Chief of the BATF's Firearms Division, during the hearings on H.R. 3757:

"Mr. Hughes. This would be a major change, would it not, in Federal jurisdiction, in that basically, we've played a supportive role in endorsement of gun laws throughout the country, supportive of local and State efforts to attempt to license and, as a matter of fact, to restrict and punish. This would, it seems to me, put us in the position of, for the first time, playing a direct role in the enforcement of a particular Federal law—a gun law—at the local level, the district level.

Mr. Cook. ATF has always been involved with supporting State and local people in their prosecutions.

Mr. Hughes. I say that's been our role—as supportive. Does this give us the original jurisdiction?

Mr. Cook. In this particular instance, this legislation would give us original Federal jurisdiction, which would—

Mr. Hughes. That would be a major departure from basically what has been the practice of the past.

Mr. Cook. As far as schools as concerned [*sic*], yes, it is.

Mr. Hughes. A major departure from a traditional federalism concept which basically defers to State and local units of govern-

Commerce Power

We are, of course, fully cognizant and respectful of the great scope of the commerce power. It is generally agreed that in a series of decisions culminating in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), the Supreme Court fixed the modern definition of the commerce power, returning it to the breadth of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). As stated in one treatise:

> "After *Wickard*, the tests for proper exercise of the commerce power were settled. First, Congress could set the terms for the interstate transportation of persons, products, or services, even if this constituted prohibition or indirect regulation of single state activities. Second, Congress could regulate intrastate activities that had a close and substantial relationship to interstate commerce; this relationship could be established by congressional views of the economic effect of this type of activity. Third, Congress could regulate—under a combined commerce clause—necessary and proper clause analysis—intrastate activities in order to effectuate its regulation of interstate commerce." Rotunda & Nowack [*sic*], *Treatise on Constitutional Law; Substance and Procedure 2nd*, § 4.9 at 404-5.

Broad as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned. As the Court said in *Maryland v. Wirtz*, 392 U.S. 183, 196, 88 S.Ct. 2017, 2024, 20 L.Ed.2d 1020 (1968):

> "This Court has always recognized that the power to regulate commerce, though broad indeed, has limits. Mr. Chief Justice Marshall paused to recognize those limits in

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ment to enforce their laws.

Mr. Cook. Yes." House Hearings, *supra*, at 14.

the course of the opinion that first staked out the vast expanse of federal authority over the economic life of the new Nation. *Gibbons v. Ogden,* 9 Wheat. 1, 194-195, 6 L.Ed. 23."

Chief Justice Marshall explained in *Gibbons v. Ogden*:

"The subject to which power is next applied, is to commerce 'among the several states.' . . . Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. . . . [T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." *Id.*, 9 Wheat. at 194-95, 6 L.Ed. at 69-70.

Similarly, in *Wickard v. Filburn,* the Court stated:

"But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect on interstate commerce* and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' " *Id.*, 317 U.S. at 125, 63 S.Ct. at 89 (emphasis added).

This passage has been quoted with approval many times. *See, e.g., Katzenbach v. McClung,* 379 U.S. 294, 302, 85 S.Ct. 377, 383, 13 L.Ed.2d 290 (1964); *Perez v. United States,* 402 U.S. 146, 151-52, 91 S.Ct. 1357, 1360, 28 L.Ed.2d 686 (1971). In *United States v. American Building Maintenance Industries,* 422 U.S. 271, 279-80, 95 S.Ct. 2150, 2156, 45 L.Ed.2d 177 (1975), the Court speaks of the "full Commerce Clause power" as extending to "all activity *substantially* affecting interstate commerce" (emphasis added). Analogously, in *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726 (1942), Chief Justice Stone's opinion for a unanimous Court states that the commerce power "extends to those intrastate activities which *in a substantial way* interfere with or obstruct the exercise of the granted power" (emphasis added).[40] Justice Harlan, writing for the Court in *Maryland v. Wirtz,* made the message explicit: "Neither here nor in *Wickard* [*v. Filburn*] has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.*, 392 U.S. at 196-97 n. 27, 88 S.Ct. at 2024 n. 27. Indeed, it could not be otherwise as the chain of causation is virtually infinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place. Hence, if the reach of the commerce power to local

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[40] *See also Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964), where the Court noted that the "discriminatory practices" the regulation of which it sustained were "now found *substantially* to affect interstate commerce," *id.* 379 U.S. at 252, 85 S.Ct. at 355 (emphasis added), and that under the Commerce Clause Congress' regulatory powers extend to "local activities . . . which might have a *substantial* and harmful effect upon" interstate "commerce." *Id.* 379 U.S. at 258, 85 S.Ct. at 358 (emphasis added).

activity that merely affects interstate commerce or its regulation is not understood as being limited by some concept such as "substantially" affects, then, contrary to *Gibbons v. Ogden*, the scope of the Commerce Clause would be unlimited, it would extend "to every description" of commerce and there would be no "exclusively internal commerce of a state" the existence of which the Commerce Clause itself "presupposes" and the regulation of which it "reserved for the state itself."

We recognize, of course, that the imprecise and matter of degree nature of concepts such as "substantially," especially as applied to effect on interstate commerce, generally renders decision making in this area peculiarly within the province of Congress, rather than the Courts. And, the Supreme Court has consistently deferred to Congressional findings in this respect, both formal findings in the legislation itself and findings that can be inferred from committee reports, testimony before Congress, or statutory terms expressly providing for some nexus to interstate commerce. Relatively recent examples of statutes upheld against Commerce Clause attacks on the basis of formal Congressional findings include *EEOC v. Wyoming*, 460 U.S. 226, 231-32 & n. 3, 103 S.Ct. 1054, 1058 & n. 3, 75 L.Ed.2d 18 (1983) (Age Discrimination in Employment Act); *FERC v. Mississippi*, 456 U.S. 742, 755-56, 102 S.Ct. 2126, 2135, 72 L.Ed.2d 532 (1982) (Public Utility Regulatory Policies Act); *Hodel v. Virginia Surface Mining*, 452 U.S. 264, 277-79, 101 S.Ct. 2352, 2361, 69 L.Ed.2d 1 (1981) (Surface Mining Control and Reclamation Act); *Perez*, 402 U.S. at 147-48 n. 1, 156, 91 S.Ct. at 1358 n. 1, 1362 (Consumer Credit Protection Act).[41] In other cases, the Court has looked to the

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[41] *Perez* does contain the statement that: "We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularlized findings in order to legislate." *Id.* 402 U.S. at 156, 91 S.Ct. at 1362. No

legislative history and the terms of the challenged statute itself to identify and sustain findings of a sufficient effect on interstate commerce. For example, in *McClung* the Court upheld section 201(b)(2) and (c) of Title II of the Civil Rights Act of 1964, the terms of which covered any restaurants "if their operations affect commerce" and presumed that any did " 'if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce.' " *Id.* 379 U.S. at 298, 85 S.Ct. at 381. In so ruling, despite the absence of "formal findings," the Court relied on the wording of the statute itself, which amounted to an express finding of the requisite effect on commerce under certain facts, and on the legislative history showing the extensive evidence before Congress implicating interstate commerce. Thus the Court noted that

> "The record is replete with testimony of the burdens placed on interstate commerce by facial discrimination in restaurants. . . . Moreover, there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes." *Id.* 379 U.S. at 299, 85 S.Ct. at 381.
>
> "We believe that this testimony afforded ample basis for the consluion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it." *Id.* 379 U.S. at 300, 85 S.Ct. at 382.

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citation of authority is given, nor is the meaning of the second sentence entirely clear. However, the opinion as a whole shows extensive consideration of and reliance on not only the evidence before Congress and the legislative history, but also the formal Congressional findings, which the Court had already observed were "quite adequate" to sustain the act. *Id.*

> ". . . Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally." *Id.* 379 U.S. at 303, 85 S.Ct. at 383.

In sustaining the statute the Court concluded by stating:

> "These appellees urge that Congress, in passing the Fair Labor Standards Act and the National Labor Relations Act, made specific findings which were embodied in those statutes. Here, of course, Congress has included no formal findings. But there absence is not fatal to the validity of the statute, [citation omitted] for the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate.
>
> "Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, §§ 201(b)(2) and (c), Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, *i.e.*, those, like the McClungs', serving food that has come from out of the State. We think in so doing that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce." *Id.* 379 U.S. at 304, 85 S.Ct. at 384 (footnote omitted).[42]

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[42] Similarly, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964), the Court upheld the same act "as applied here to a motel which concededly serves interstate travel-

Where Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer "if there is any rational basis for" the finding. *Preseault v. I.C.C.*, 494 U.S. 1, 17, 110 S.Ct. 914, 924, 108 L.Ed.2d 1 (1990); *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258 (1964); *McClung*, 379 U.S. at 304, 85 S.Ct. at 383. Practically speaking, such findings almost always end the matter.[43] This means that the states, and the people,

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ers." *Id.* 379 U.S. at 261, 85 S.Ct. at 360. The Court noted that the act, by its express terms, applied to an establishment "if its operations affect commerce," which was defined to include "any inn, hotel, motel, or other establishment which provides lodging to transient guests." *Id.* 379 U.S. at 247, 85 S.Ct. at 352-53. It observed that statute [*sic*] was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved." *Id.* 379 U.S. at 250-51, 85 S.Ct. at 354. In sustaining the act as applied the Court stated:

> "While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S.Rep. No. 872, *supra*; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H.R.Rep. No. 914, *supra*. . . . We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel" *Id.* 379 U.S. at 252-53, 85 S.Ct. at 355.

[43] We know of no Supreme Court decision in the last half century that has set aside such a finding as without rational basis. However, the Court has never renounced responsibility to invalidate legislation as beyond the scope of the Commerce Clause. *See, e.g., Maryland v. Wirtz*, 392 U.S.

must largely look to their representatives in Congress to fairly and consciously fix, rather than to simply disregard, the Constitution's boundary line between "the completely internal commerce of a state . . . reserved for the state itself" and the power to regulate "Commerce with foreign Nations, and among the several States." Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding.[44] And, in such a situation there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states. Indeed, as in this case, there is no substantial indication that the commerce power was even invoked.[45]

183, 198, 88 S.Ct. 2017, 2025, 20 L.Ed.2d 1020 (1968) ("This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the states."). Nor may we renounce that duty.

[44] Conceivably, a purely informational void could be filled by evidence in court of the same general kind that might have been presented to a Congressional committee or the like concerning any relationship between the legislation and interstate commerce. However, in such a situation the court could only guess at what Congress' determination would have been. In any event, there is no such evidence here.

[45] We recognize that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 143, 68 S.Ct. 421, 424, 92 L.Ed. 596 (1948). But in that case, the Court went on immediately to say: "Here it is plain from the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause." *Id.* (footnote omitted). *See also id.* 333 U.S. at 144, 68 S.Ct. at 423 ("The legislative history of the present Act makes absolutely clear that there has not yet been eliminated the deficit in housing which in considerable measure was caused by the heavy demobilization of veterans and by the cessation or reduction in residential construction during the period of hostilities due to the allocation of building materials to military projects"; footnote omitted). The

Congressional enactments are, of course, presumed constitutional. But in certain areas the presumption has less force. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938) ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments. . . ."). Here the question is essentially a jurisdictional one, and any expansion of federal power is at the expense of the powers reserved to the states by the Tenth Amendment, which is, after all, as much a part of the Bill of Rights as the First.[46] Both the management of education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state responsibility, and section 922(q) indisputably represents a singular incursion by the Federal Government into territory long occupied by the States. In such a situation where we are faced with competing constitutional concerns, the importance of Congressional findings is surely enhanced.[47]

Court proceeded to sustain the legislation under the war power. Here, by contrast, the legislative history does not show that Congress, in enacting the Gun-Free School Zones Act, was invoking the Commerce Clause.

[46] It is also conceivable that some applications of section 922(q) might raise Second Amendment concerns. Lopez does not raise the Second Amendment and thus we do not now consider it. Nevertheless, this orphan of the Bill of Rights may be something of a brooding omnipresence here. For an argument that the Second Amendment should be taken seriously, see Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

[47] As we have observed (note 42, *supra*), in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964), the Court upheld section 201(b)(1) & (c) of Title II of the Civil Rights Act of 1964, respecting hotels, motels, and inns, as a proper exercise of the commerce power, relying on the wording of the statute and its legislative history. The Court distinguished the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), which had stricken down the

We draw support for our conclusion concerning the importance of Congressional findings from recent holdings that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion. In *Pennsylvania v. Union Gas*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (plurality opinion), the Court held that Congress could use its commerce power to abrogate the sovereign immunity guaran-

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Civil Rights Act of 1875. The *Heart of Atlanta* opinion observes that the opinion in *Civil Rights Cases* "specifically . . . note[d] that the Act was not conceived in terms of the commerce power." *Heart of Atlanta*, 379 U.S. at 250, 85 S.Ct. at 354. The *Heart of Atlanta* opinion also in this connection contrasts the 1875 and 1964 acts:

> "Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in 'inns, public conveyances on land or water, theaters, and other places of public amusement,' without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved." *Id.* 379 U.S. at 250-51, 85 S.Ct. at 354.

The suggestion is that it is questionable whether an act which has neither an express or facial commerce nexus nor legislative history demonstrating such a nexus may be sustained as an exercise of the commerce power.

In a similar vein, we note that in *Woods v. Cloyd Miller Co.*, 333 U.S. 138, 68 S.Ct. 421, 92 L.Ed. 596 (1946), the Supreme Court, relying on legislative history (see note 43, *supra*); sustained the Housing and Rent Act of 1947, which essentially contained a form of nationwide federal rent control, on the basis of the war power. The legislation did not expressly invoke the war power, but the Court sustained it on that basis, relying on legislative history, despite the Court's recognition that this principle should not extend long after the end of hostilities, as if it did "it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well." *Id.* 333 U.S. at 144, 68 S.Ct. at 424. Significantly, the Court never mentioned the Commerce Clause. Moreover, the Court's referenced concern seems to implicitly assume that the Commerce Clause would not reach so far.

teed to the States by the Eleventh Amendment only if its intent to do so is "unmistakably clear." *Id.* 491 U.S. at 7, 109 S.Ct. at 2277 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985)). In another case decided the same day, the Court explained that this rule exists because "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine." *Dellmuth v. Muth*, 491 U.S. 223, 227, 109 S.Ct. 2397, 2400, 105 L.Ed.2d 181 (1989) (citations and internal quotation marks omitted). Two years later, in *Gregory v. Ashcroft*, the Court held that the Age Discrimination in Employment Act (ADEA) did not sweep away the Missouri Constitution's provision for the mandatory retirement of state judges at age seventy. Arguing that a State's power to set the qualifications for its judiciary "is a decision of the most fundamental sort for a sovereign entity," ___ U.S. at ___, 111 S.Ct. at 2400, the Court held that the ADEA did not bespeak a sufficiently clear intent to annul this state preregative:

> "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Id.* ___ U.S. at ___, 111 S.Ct. at 2401 (quoting *Atascadero*, 473 U.S. at 243, 105 S.Ct. at 3147).[48]

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[48] The Court then quoted extensively from *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The *Will* Court had stated:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must makes its intention to do so 'unmistakably clear in the language of the stat-

We recognize that the rule being applied in those cases is one of statutory construction. Nevertheless, *Gregory, Union Gas,* and *Bass* establish that Congress' *power* to use the Commerce Clause in such a way as to impair a State's sovereign status, and its *intent* to do so, are related inquiries. Thus, in *Gregory,* Congress' power to trump the Missouri Constitution was unquestioned but its intent to do so was unclear; hence the Court held that the State's Tenth Amendment interests would prevail. Here, Congress surely intended to make the possession of a firearm near a school a federal crime, but it has not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause.

In 1985, the Supreme Court held that the Tenth Amednment imposes no internal limitation upon the Commerce Clause; as long as Congress acts within the commerce power, it cannot violate the Tenth Amendment. *See Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (overruling *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)). The

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ute.' *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985); . . . *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981); *South Dakota v. Dole,* 483 U.S. 203, 207, 107 S.Ct. 2793, 2795, 97 L.Ed.2d 171 (1987). 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971)." *Id.* 491 U.S. at 65, 109 S.Ct. at 2308-09.

Garcia Court sought to assuage the fears of four dissenting Justices by arguing that, as a body of state representatives, Congress would respect the sovereignty of the several States and could be trusted to police the constitutional boundary between the Tenth Amendment and the Commerce Clause. *See Garcia*, 469 U.S. at 549-55, 105 S.Ct. at 1017-19. By expecting Congress to build a more sturdy foundation for the exercise of its commerce power than it has done in this case, we hope to

> "further[ ] the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . [T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988) (footnote omitted).

The Gun Free School Zones Act extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session. Neither the act itself nor its legislative history reflect any Congressional determination that the possession denounced by section 922(q) is in any way related to interstate commerce or its regulation, or, indeed, that Congress was exercising its powers under the Commerce Clause. Nor do any prior federal enactments or Congressional findings speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the

long-standing pattern of federal firearms legislation.[49]

The district court sustained section 922(q) on the basis that the "business' of elementary, middle and high schools . . . affects interstate commerce." However, as noted, there is no finding, legislative history, or evidence to support section 922(q) on this basis. The management of education, of course, has traditionally been a state charge, as Congress has expressly recognized. *See* 20 U.S.C. § 3401(4) ("The Congress finds that . . . in our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States.").[50] We are unwilling to ourselves simply assume that

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[49] Thus, we are not faced with a situation such as that addressed by Justice Powell in his concurrence in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). *See id.* 448 U.S. at 503, 100 S.Ct. at 2787 (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

See also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion), in which the court held unconstitutional Richmond's plan requiring thirty percent of public subcontracting work to be given to minority-owned business, in part because of the city's failure adequately to support its "finding" that past discrimination necessitated race-conscious remedial action. Specifically, the Court rejected the city's reliance upon findings made by Congress (and used by the Court to sustain a similar federal racial set-aside in *Fullilove*) that there had been nationwide discrimination against blacks in the construction industry, saying that "[t]he probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited." *Id.* 488 U.S. at 504, 109 S.Ct. at 727. Further, the Court saw "*absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." *Id.* 488 U.S. at 506, 109 S.Ct. at 728 (original emphasis).

[50] We reject two related arguments by the government in this connection. First it urges that section 922(q) "is not fundamentally different

the concededly intrastate conduct of mere possession by any person of any firearm substantially affects interstate commerce, or the regulation thereof, whenever it occurs or even most of the time that it occurs, within 1000 feet of the grounds of any school, whether or not then in session. If Congress can thus bar firearms possession because of such a nexus to the grounds of *any* public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, "sneakers," Game Boys, or slide rules.

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from the 'schoolyard statute,' 21 U.S.C. § 860, which provides greater punishment for drug offenses occurring within 1000 feet of a school." However, this statement ignores the fundamental difference that all drug trafficking, intrastate as well as interstate, has been held properly subject to federal regulation on the basis of detailed Congressional findings that such was necessary to regulate interstate trafficking. *See United States v. Lopez*, 459 F.2d 949, 951-53 (5th Cir.), *cert. denied sub nom. Llerena v. United States*, 409 U.S. 878, 93 S.Ct. 130, 34 L.Ed.2d 131 (1972). Thus, section 860 is not a regulation of schools but of drugs, and its jurisdictional foundation is the now unchallenged federal authority over intrastate as well as interstate narcotics trafficking. See cases cited in note 10, *supra*.

Second, the government urged the district court that "[t]he federal government has provided thousands and thousands of dollars in federal educational grant moneys to the San Antonio Independent School District. . . . The federal government is entitled to protect its investment in education. . . ." We reject this contention. Although Congress may attach conditions to the receipt of federal funds, it must do so unambiguously. *See South Dakota v. Dole*, 483 U.S. 203, 206-08, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981). We cannot view section 922(q) as a condition meant to "protect the federal investment in schools," as the government puts it, because Congress has in no way tied section 922(q) to federal funding. Section 922(q), which expressly extends to "private" and "parochial" as well as "public" schools, does not even mention federal funding, and applies whether or not such funding is received.

The government seeks to rely on the rule that "[w]here the *class of activities* is regulated and that *class* is within the reach of the federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S. at 154, 91 S.Ct. at 1361 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193, 88 S.Ct. 2017, 2022, 20 L.Ed.2d 1020 (1968)). This theory has generally been applied to the regulation of a class of activities the individual instances of which have an interactive effect, usually because of market or competitive forces, on each other and on interstate commerce. A given local transaction in credit, or use of wheat, because of national market forces, has an effect on the cost of credit or price of wheat nationwide. Some such limiting principle must apply to the "class of activities" rule, else the reach of the Commerce Clause would be unlimited, for virtually all legislation is "class based" in some sense of the term. We see no basis for assuming, particularly in the absence of supporting Congressional findings or legislative history, that, for example, ordinary citizen possession of a shotgun during July 900 feet from the grounds of an out-of-session private first grade in rural Llano County, Texas, has any effect on education even in relatively nearby Austin, much less in Houston or New Orleans. Nor can we assume that elementary education in Houston substantially affects elementary education in Atlanta. As noted, any such holding would open virtually all aspects of education, public and private, elementary and other, to the reach of the Commerce Clause.[51]

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[51] The government also urges that we have sustained the prohibition of all simple narcotics possession. *See United States v. Lopez*, 461 F.2d 499 (5th Cir. 1972) (*per curiam*). However, there we relied on our decision in the earlier, different *Lopez* case, 459 F.2d 949, where we in turn relied on Congressional findings that such was necessary to effectively regulate the interstate trafficking in narcotics. The possession proscription was a necessary means to regulate the interstate commercial trafficking in

We hold that section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.[52] Whether with adequate Congressional findings or legislative history, national legislation of similar scope could be sustained, we leave for another day. Here we merely hold that Congress has not done what is necessary to locate section 922(q) within the Commerce Clause. And, we expressly do not resolve the question whether section 922(q) can ever be constitutionally applied. Conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce.[53] Here, in fact, the parties stipulated that a BATF agent was prepared to testify that Lopez's gun had been manufactured outside of the State of Texas. Lopez's conviction must still be reversed, however, because his indictment did not allege *any* connection to interstate commerce. An indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective. *See Stirone v. United States*, 361 U.S. 212, 216-18, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) (Hobbs Act); *United States v. Hooker*, 841 F.2d 1225, 1227-32 (4th Cir. 1988) (en banc) (RICO); *United States v. Moore*, 185 F.2d

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narcotics. There is nothing analogous in the present case. Section 922(q) is not related (either in terms or by legislative findings or history) to the regulation of interstate trafficking in firearms or to any scheme for such purpose, and there has been no general outlawing of the possession of ordinary firearms by ordinary citizens. Moreover, firearms do not have the fungible and untraceable characteristics of narcotics.

[52] No other basis for section 922(q) has been suggested.

[53] *Cf. Heart of Atlanta*, 379 U.S. at 261, 85 S.Ct. at 360 ("We, therefore, conclude that the action of the Congress in the adoption of the Act *as applied here to a motel which concededly serves interstates travelers* is within the power granted it by the Commerce Clause of the Constitution.") (emphasis added). However, the "as applied" issue has not been briefed or argued with respect to section 922(q) and, as noted, we expressly do not resolve it.

92, 94 (5th Cir. 1950) (FLSA). This is true even though the language of section 922(q) contains no such requirement. *See Russell v. United States*, 369 U.S. 749, 763-66, 82 S.Ct. 1038, 1047-48, 8 L.Ed.2d 240 (1962); 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.2, at 452 (1984). Finally, because an indictment, unlike a bill of information, cannot be amended, the failure to allege each element is fatal. *Cf. United States v. Garreti*, 984 F.2d 1402, 1415 (5th Cir. 1993); *United States v. Mize*, 756 F.2d 353, 355-56 (5th Cir. 1985).

For the reasons stated, the judgment of conviction is reversed and the cause is remanded with directions to dismiss the indictment.[54]

REVERSED.

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[54] Because we reverse Lopez's conviction, we do not reach the challenge he raises to his sentence.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRIMINAL NO. SA-92-CR-84

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALFONSO LOPEZ, JR., DEFENDANT

[Filed May 5, 1992]

ORDER

Came on this day to be considered the Defendant's Motion to Dismiss the Indictment and the Government's Response thereto. Upon consideration thereof,

IT IS ORDERED that said Motion to Dismiss be DENIED. The statute enacted as the "Gun-Free School Zones Act of 1990" and codified at 18 U.S.C. § 922(q) is a constitutional exercise of Congress' well-defined power to regulate activities in an [*sic*] affecting commerce, and the "business" of elementary, middle and high schools, as exemplified by the "business" of Edison High School in San Antonio, a public high school organized under the laws of the State of Texas, affects interstate commerce.

IT IS SO ORDERED this 5th day of May, 1992.

/s/ H. F. Garcia

H. F. GARCIA
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5641

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ALFONSO LOPEZ, JR., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion Sep. 15, 1993 5 Cir. ___, ___ F.2d ___)
[Filed Nov. 10, 1993]

Before REAVLEY, KING and GARWOOD, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ WILL GARWOOD

United States Circuit Judge

REHG-8

APPENDIX D

18 U.S.C. (Supp. IV 1992):

§ 921. Definitions

(a) As used in this chapter—

* * * * *

(25) The term "school zone" means—

(A) in, or on the grounds of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term "school" means a school which provides elementary or secondary education, as determined under State law.

* * * * *

§ 922. Unlawful acts

* * * * *

(q)(1)(A) It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) shall not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtain such a license, the law enforcement authorities of the State

or political subdivision verify that the individual is qualified under law to receive the license;

(iii) which is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack which is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(2)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm at a place that the person knows is a school zone.

(B) Subparagraph (A) shall not apply to the discharge of a firearm—

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone

and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(3) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun-free school zones as provided in this subsection.

* * * * *

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No. 93-1260

In the Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

ALFONSO LOPEZ, JR.,

Respondent.

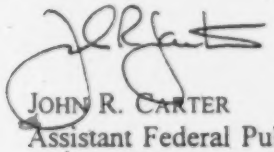
ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Respondent Alfonso Lopez, Jr., by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(6), respectfully moves this Honorable Court for leave to proceed *in forma pauperis*, and to file the attached Brief in Opposition to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Respondent was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

DATED: March 24, 1994.

Respectfully submitted.



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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a conviction under the Gun-Free School Zones Act can be sustained when the Act does not require a nexus with commerce.

No. 93-1260

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October Term, 1993

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ON PETITION FOR A WRIT OF CERTIORARI
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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT A QUESTION MERITING REVIEW BY CERTIORARI.

This case does not present the question stated by the Government, and the petition overstates both the scope and the impact of the Fifth Circuit's ruling. In its decision below, the Fifth Circuit did not hold that the Commerce Clause did not empower Congress to enact the Gun-Free School Zones Act;[1] it held that

1. Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (1990).

"Congress has not done what is necessary to locate section 922(q) [the Act] within the Commerce Clause." (Pet. 53a) In so doing, the court of appeals did not address whether Congress has the power to create *any law* making it a federal offense to possess a firearm within 1,000 feet of a school; instead, it found that Respondent's conviction under *this* Act could not be sustained.

A. The Fifth Circuit Did Not Annul an Act of Congress.

While the Government invites this Court to grant review by alluding to the inherent national importance of any decision that involves "the exercise of the grave power of annulling an Act of Congress" (Pet. 6, quoting *United States v. Gainey*, 380 U.S. 63, 65 (1965)), the Fifth Circuit Court of Appeals expressly declined to exercise its jurisdiction do so (Pet. 53a). Instead, it ruled that the indictment in this case was defective because it failed to allege a nexus to commerce.

In its zeal to posture the decision below in a manner more likely to gain review, the Government overlooks the important constitutional principle followed by the court of appeals: its duty, whenever possible, to construe a statute as constitutional. *See Dennis v. United States*, 341 U.S. 494, 501 (1950). This Court has stated that when Congress uses the term "in or affecting commerce" it intends to exercise its full power under the Commerce Clause. *Russell v. United States*, 471 U.S. 856, 859 (1985). Noting the absence of such language in the Act, the Fifth Circuit said that to keep it within that constitutional limit would require either congressional findings or prosecutorial allegations of the commerce nexus. Finding neither in this case, it reversed Lopez's conviction.

The court of appeals expressly reserved for later decision "whether section 922(q) can ever be constitutionally applied" and implied that "conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce." (Pet. 53a.) While acknowledg-

ing this tacit invitation to alter its charging practices (Pet. 4 n.1), the Government has instead chosen to seek review by certiorari. Unless and until the Government avails itself of this easily available alternative, this Court should decline review.

B. Any Conflict with the Ninth Circuit Is a Conflict of Principle and Not a Direct Conflict.

The Government also seeks review because of what it calls a conflict with the decision of the Ninth Circuit Court of Appeals in *United States v. Edwards*, 13 F.3d 291 (9th Cir. 1993). While the results reached in the two cases are diametrically opposed, the conflict between the two decisions is neither direct nor irreconcilable. The Ninth Circuit based its decision in *Edwards* on what it viewed as its governing circuit precedent set out in *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991). 13 F.3d at 293. *Evans* did not involve a challenge to the constitutionality of the Gun-Free School Zones Act, 18 U.S.C. § 922(q); it addressed the constitutionality of the ban on possession of machine guns set out in § 922(o). The Ninth Circuit upheld that ban as a reasonable exercise of Congress's power to regulate firearms under the Commerce Clause. 928 F.2d at 862. The *Edwards* court found the *Evans* holding controlling on the challenge to section 922(q). Governed as it believed it was by its own precedent,[2] the panel's stated disagreement with *Lopez*'s rationale must be viewed as only dicta.

In the decision below, the Fifth Circuit carefully considered the Ninth Circuit's decision in *Evans*, but found it to be "in reliance on Congressional findings that appear to us to be inapplicable in the present context." (Pet. 27a.) It intimated no view concerning the validity of section 922(o) and rejected no more

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2. The Ninth Circuit panel stated: "We cannot adopt the Fifth Circuit's rationale because we are bound by the law to follow the reasoning of our decision in *Evans*." 13 F.3d at 294.

than "the general statements in *Hale*[3] and *Evans* respecting the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968." (Pet. 29a n.31.) Moreover, in light of the existence of specific congressional findings regarding "highly destructive weapons," which lend support to section 922(o)'s ban on machine guns,[4] if presented with a challenge to that section the Fifth Circuit might well reach the same result as the Ninth Circuit did in *Evans*.

Thus, any conflict between this case and *Edwards*, while having real effect on the court of appeals' disposition of this case, is not direct. *Edwards* bases its holding on what its panel viewed as controlling precedent in *Evans*. The Fifth Circuit considered that same holding but found that it concerned a different statute and did not inform its consideration of the Gun-Free School Zones Act. The only direct conflict is an intercircuit difference of opinion on controlling intracircuit precedent. Such a conflict need not be resolved by this Court.

C. Respondent's Conduct Is Criminally Punishable in Every State Within the Fifth Circuit.

If, as the Government argued below, the purpose of the Gun-Free School Zones Act was to preserve a safe haven around schools, any impediment to its enforcement posed by this decision will not diminish existing state-law safeguards, nor would its continued enforcement significantly increase safety in and around schools. In the states comprising the Fifth Circuit, state law already forbids the

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3. *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992).

4. In the Omnibus Crime Control and Safe Streets Act of 1968, Congress found "the lack of adequate federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority." Pub. L. No. 90-351, § 901(a)(8), 82 Stat. 197, 226.

carrying of most firearms in and around schools.[5] Indeed, Respondent was initially charged in state court; that prosecution was dropped "due to the federal prosecution."[6] In addition, the Gun-Free School Zones Act will remain functionally superfluous so long as prosecution under it is generally limited to adults, see 18 U.S.C. § 5031 (limiting prosecution of persons under 18), while schools are generally populated by juveniles.[7]

Similarly, requiring a nexus to interstate or foreign commerce in this context will not impair federal law enforcement in this area. In the 26 years since the passage of the Gun Control Act of 1968,[8] Congress has never found it necessary to expand the Act's proscription against possession of firearms by convicted felons by abandoning a nexus with commerce, probably because most firearms do have such a nexus.

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5. In Texas and Louisiana, it is a felony to carry a firearm on school premises. TEX. PENAL CODE ANN. § 46.04(a)(1) (West Supp. 1993); LA. REV. STAT. ANN. § 14:95.2 (West Supp. 1993). Louisiana extends this proscription to a "firearm-free zone" roughly equivalent to that created by section 922(q). LA. REV. STAT. ANN. § 14:95.6 (West Supp. 1993) ("firearm-free zone"). Texas increases the penalty for many weapons offenses if they occur on the premises of a primary or secondary school. TEX. PENAL CODE ANN. § 46.13 (West Supp. 1993). In Mississippi, it is illegal for a student to carry a concealable firearm on or within 2 miles of school grounds, MISS. CODE ANN. § 97-37-17 (Supp. 1993), and illegal for anyone (including persons with concealed-weapon permits) to carry a concealed or partly concealed weapon on a school campus. MISS. CODE ANN. § 97-37-1 (Supp. 1993), § 45-9-101 (Supp. 1993) (concealed weapon permit not valid on school grounds). The Mississippi term "concealed weapon" "includes pistols, revolvers, and shortened rifles or shotguns." *Id.* § 97-37-1(1).

6. Pet. 2a n.1.

7. Petitioner has made no showing of the number of convictions potentially affected by the *Lopez* decision.

8. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

D. Congressional Action May Obviate Any Need for Review.

As Petitioner acknowledges (Pet. 6 n.4), legislation now before Congress may supply findings that link the proscribed activities to the Commerce Clause powers.[9] Such findings should significantly alter the effect of the *Lopez* decision on future prosecutions under the Act.[10] Such findings would also limit the effect of this Court's review to prosecutions under the existing, unamended Act.

II. THE CASE BELOW WAS CORRECTLY DECIDED.

As explained earlier, the Fifth Circuit did not annul an Act of Congress. It simply decided that because the indictment in this case did not allege any nexus to interstate or foreign commerce, it should have been dismissed. In so doing it carefully examined not only the Gun-Free School Zones Act, but all previous federal firearms legislation. In none of it could the court discern that Congress had made any finding that the mere possession of a firearm on or within 1,000 feet of a school zone had a significant effect on interstate or foreign commerce. Lacking any such evidence of congressional linking of the entire class of activity to commerce, it held that to the extent § 922(q) is read to authorize a conviction without allegation of a commerce nexus, it is unconstitutional. The Government chooses not to amend its charging practice accordingly.

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9. In addition to the House bill passed as amended by the Senate, H.R. 3355, see H.R. 3406, 103d Cong., 1st Sess. (introduced, 139 Cong. Rec. H8658 (daily ed. Oct. 28, 1993)), and H.R. 3763, 103d Cong., 2d Sess. (introduced, 140 Cong. Rec. H203-05 (daily ed. Feb. 2, 1994)) (both amending the Act to add as an element that the firearm had been shipped or transported in commerce).

10. Nonetheless, it bears noting that "simply because Congress may conclude that a particular activity substantially affects commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 313 (1981) (Rehnquist, J., concurring.)

The federal government is a government of limited powers. Powers not granted to it by the Constitution were reserved to the states. Included among its powers is the power to regulate commerce between the states, and this power has been construed liberally. It has been expanded to reach many areas of national life, but each extension must retain a nexus to commerce. That nexus may be found by Congress itself, or by a fact-finder chosen by Congress. Here, Congress neither made findings nor assigned that task to another fact finder. By failing to do so, it severed the connection between its Commerce Clause powers and the Act.

The Fifth Circuit also correctly took into consideration the long-recognized primacy of the states in the areas of both criminal law and education. It correctly found that principles of federalism required clear evidence that Congress intended to supplant the states' roles, and that such evidence is lacking here. Its decision to honor that primacy, absent clear congressional intent to do otherwise, remains true to the principles of federalism embodied in the Constitution.

If the Government is correct in asserting that this is an important case, its importance derives from the Fifth Circuit's recognition that the Constitution's limitations on federal power are not vestigial but real. While greatly reduced in significance as our economy has become truly national, those limitations still act to ensure that control over most aspects of day-to-day living remains in the local institutions from which our national government was created. The Commerce Clause, while supreme where properly implicated, does not confer upon Congress a general police power. Congress's invocation of those powers must always be linked in some way to commerce. No such linkage was found here, and the court of appeals properly declined to indulge in *post hoc* judicial salvaging of an

unconnected intrusion of federal power where Congress had previously indicated no intention of going.[11]

CONCLUSION

FOR THESE REASONS, the petition for writ of certiorari should be denied.

Respectfully submitted.

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11. In the Gun Control Act of 1968, Congress stated that "it is not the purpose of this title to place any undue burden or unnecessary federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." Pub. L. No. 90-618, § 101, 82 Stat. 1213 (1968). In the Firearms Owners' Protection Act of 1986 Congress reaffirmed this finding and further found that "the rights of citizens . . . against unconstitutional exercise of authority under the ninth and tenth amendments . . . require additional legislation to correct existing firearms statutes and enforcement policies." Pub. L. No. 99-308, § 1(b), 100 Stat. 449 (1986).

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v.

ALFONSO LOPEZ, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Two points in respondent's brief in opposition warrant a brief reply.

1. Respondent argues (Br. in Opp. 2-3) that the decision of the court of appeals does not warrant review because it "did not annul" 18 U.S.C. 922(q) entirely, but instead left open the possibility that some prosecutions under that provision would be constitutionally permissible. As we explained in the petition (at 4 n.1), the court of appeals stated that it was "[c]onceivabl[e]" that a conviction under Section 922(q) "might be sustained if the government alleged and proved that the offense had a nexus to commerce." Pet. App. 53a. But the court of appeals' reservation on that point does not undermine the significance of the decision in this case, which relies on the Constitution to overturn petitioner's conviction. That conviction

rested on an indictment and evidence establishing conduct proscribed by the language of the statute. The decision of the court of appeals invalidating that conviction thus invalidates Congress's decision to extend criminal sanctions to that conduct.

2. Respondent also attempts (Br. in Opp. 3-4) to downplay the significance of the conflict between the decision of the court of appeals in this case and the decision of the Ninth Circuit in *United States* v. *Edwards*, 13 F.3d 291 (1993). Respondent points out that the panel in *Edwards* rested its decision on an earlier Ninth Circuit decision interpreting the Commerce Clause. See Br. in Opp. 3 (discussing *United States* v. *Evans*, 928 F.2d 858 (9th Cir. 1991), which rejected a constitutional challenge to 18 U.S.C. 922(o)). But the precedential basis for the decision in *Edwards* does not undermine the fact, with which respondent agrees, that the "conflict between this case and *Edwards* * * * ha[d] [a] real effect on the court of appeals' disposition of this case," Br. in Opp. 4. To put the matter more directly, if respondent's conduct had occurred in the Ninth Circuit, his conviction would have been affirmed. The invalidation of his conviction by the Fifth Circuit accordingly creates a square conflict warranting review by this Court.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

APRIL 1994

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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, empowered Congress to enact 18 U.S.C. 922(q) (Supp. IV 1992), which makes it a federal offense to possess a firearm within 1000 feet of a school.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1260

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 2 F.3d 1342. The order of the district court (Pet. App. 55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1993. The court of appeals denied a petition for rehearing on November 10, 1993. Pet. App. 56a-57a. The petition for a writ of certiorari was filed on February 2, 1994, and was granted on April 18, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Necessary and Proper Clause of the Constitution, Article I, Section 8, Clause 18, provides: "The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

3. The provisions of 18 U.S.C. 921(a)(25), 921(a)(26), and 922(q) (Supp. IV 1992) are reprinted at Pet. App. 58a-60a.

STATEMENT

After a bench trial in the United States District Court for the Western District of Texas, respondent was convicted on one count of possession of a firearm within a school zone, in violation of 18 U.S.C. 922(q) (Supp. IV 1992). He was sentenced to six months' imprisonment, to be followed by two years' supervised release. The court of appeals reversed. Pet. App. 1a-54a.

1. This case presents the question whether the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844, constitutes a permissible exercise of Congress's legislative authority under the Commerce Clause. That statute makes it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable

cause to believe, is a school zone." 18 U.S.C. 922(q)(1)(A) (Supp. IV 1992). Violators are subject to penalties of up to five years' imprisonment and a $5,000 fine. 18 U.S.C. 924(a)(4) (Supp. IV 1992). The Act defines a "school zone" to include the grounds of a public, private, or parochial school, or property within 1000 feet of such premises. 18 U.S.C. 921(a)(25) (Supp. IV 1992). The statute also contains several exceptions to its general prohibition on gun possession on and around school premises. 18 U.S.C. 922(q)(1)(B) (Supp. IV 1992).[1]

The Gun-Free School Zones Act was introduced in the House as H.R. 3757, 101st Cong., 2d Sess. (1990), and in the Senate as S. 2070, 101st Cong., 2d Sess. According to the sponsors of the legislation, its purpose was to "address the devastating tide of firearm violence in our Nation's schools." 135 Cong. Rec. E3988 (daily ed. Nov. 20, 1989) (Representative Feighan). As Senator Kohl explained in the course of introducing S. 2070, "[w]hen Congress mandated drug-free school zones in 1984, we declared that our Nation's classrooms deserve special protection. In the same way, this bill will help keep the areas around our schools from becoming sanctuaries for armed

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[1] For example, the statutory prohibition does not apply to firearms located on private property not part of school grounds, 18 U.S.C. 922(q)(1)(B)(i) (Supp. IV 1992); to individuals verified as qualified and licensed under state or local law to possess firearms, 18 U.S.C. 922(q)(1)(B)(ii) (Supp. IV 1992); to unloaded firearms stored in a locked container or on a locked firearms rack which is on a motor vehicle, 18 U.S.C. 922(q)(1)(B)(iii) (Supp. IV 1992); to individuals acting pursuant to a contractual agreement with the school, 18 U.S.C. 922(q)(1)(B)(v); or to law enforcement officers acting in their official capacity, 18 U.S.C. 922(q)(1)(B)(vi) (Supp. IV 1992).

criminals and drug gangs. Gun-free school zones * * * are an important step toward fighting gun violence and keeping our teachers and children safe." 136 Cong. Rec. 1165 (1990). Senator Kohl noted that "[t]he National School Safety Center estimates that more than 100,000 students carry guns to school every day, and that more than a quarter of a million students brought a handgun to school at least once in 1987." *Ibid.* The Act, he stated, would "ensure that our school grounds do not become battlegrounds." *Ibid.*

The Gun-Free School Zones Act was passed by the Senate as part of the Crime Control Act of 1990. See 136 Cong. Rec. S9477, S9519 (daily ed. July 11, 1990) (passage of Act by Senate); 136 Cong. Rec. S10,184, S10,240 (daily ed. July 20, 1990) (text of Act). Approximately two months later, the Act was the subject of hearings by a House subcommittee. See *Gun Free School Zones Act of 1990: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (hereinafter *House Hearings*). Witnesses who appeared before the subcommittee agreed that the previous several years had "seen a marked, virtually continuous rise in the number of incidents involving firearms in or around school property." *Id.* at 26. The subcommittee also heard testimony regarding the deleterious effects of firearm violence upon the educational process. A representative of the National Education Association and National PTA, for example, stated that "[s]tudents in Chicago, New York, Miami, and elsewhere are exhibiting signs of 'post-traumatic stress syndrome.' Young children exposed to violence in the schools and in the neighborhood have become numb—seemingly immune to sights of brutality in the same

way as the children of Belfast, Beirut, or Johannesburg." *Id.* at 46-47. A separate statement issued by the National PTA noted that "creation of gun free school zones would send the message that schools are serious about providing safe environments so children can learn. Further, this bill is consistent with one of the national education goals set forth by the nation's governors and President—that 'by the year 2000, every school in America will be free of drugs and violence and [will] offer a disciplined environment conducive to learning.'" *Id.* at 77.

Although the hearings extensively addressed the impact of increasing firearms violence upon the educational system, the witnesses did not specifically discuss the effects upon interstate commerce of firearms possession on or near school property. During the hearings, one official of the Bureau of Alcohol, Tobacco and Firearms (BATF), expressed concern that the "source of constitutional authority to enact the legislation [was] not manifest on the face of the bill." *House Hearings* at 10. By contrast, that official noted, prior legislation restricting possession of firearms "contained specific findings relating to the Commerce Clause and other constitutional bases, and the unlawful acts specifically included a commerce element." *Ibid.*

The Gun-Free School Zones Act was not included in the House version of the Crime Control Act of 1990. The Act's prohibitions were adopted by the conference committee, however, see 136 Cong. Rec. S17,595 (daily ed. Oct. 27, 1990), and were enacted into law as Section 1702 of the Crime Control Act of 1990. See Pub. L. No. 101-647, § 1702, 104 Stat. 4844-4845. Neither the statute nor its legislative history contained express congressional findings regarding

the effects upon interstate commerce of gun possession in a school zone.[2]

2. On March 10, 1992, respondent, then a twelfth-grade student at Edison High School in San Antonio,

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[2] When the President signed the Crime Control Act of 1990 into law, he asserted that particular provisions of the legislation "unnecessarily constrain the discretion of State and local governments. * * * Most egregiously, section 1702 inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress." Statement by President George Bush Upon Signing S. 3266, 26 Weekly Comp. Pres. Doc. 1944, 1945 (Nov. 29, 1990).

After the Fifth Circuit's decision in the instant case, the Senate passed an amended version of a House bill including specific findings that the actions proscribed by U.S.C. 922(q) affect interstate commerce. Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103d Cong., 1st Sess. § 2972 (*reprinted* as amended by the Senate at 139 Cong. Rec. S17,153-S17,154 (daily ed. Nov. 24, 1993)); see 139 Cong. Rec. S16,301 (daily ed. Nov. 19, 1993) (passage of Act by Senate). The Senate found, *inter alia*, that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools"; that "ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason"; that "the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country"; that "this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States"; and that "Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools." 139 Cong. Rec. S17,154 (daily ed. Nov. 24, 1993) (italics omitted).

Texas, arrived at school in possession of a concealed .38 caliber handgun, together with five bullets. In response to an anonymous tip, school officials confronted respondent, who admitted that he was carrying the weapon. He explained that an individual he identified as "Gilbert" had given him the gun to deliver to another individual after school for use in what respondent described as a "gang war." Respondent stated that he was to receive $40 for delivering the weapon. See Pet. App. 2a.

3. A grand jury indicted respondent for violating Section 922(q). Respondent moved to dismiss the indictment, arguing that Section 922(q) is unconstitutional. The district court denied the motion in a brief order, stating that Section 922(q)

> is a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce, and the "business" of elementary, middle and high schools, as exemplified by the "business" of Edison High School in San Antonio, a public high school organized under the laws of the State of Texas, affects interstate commerce.

Pet. App. 55a.

Respondent subsequently waived his right to a jury trial and was tried on stipulated evidence. The district court convicted respondent and sentenced him to six months' imprisonment, to be followed by two years' supervised release. See Pet. App. 3a.

4. The court of appeals reversed, rejecting the government's contention that the Commerce Clause empowered Congress to enact Section 922(q). Pet. App. 1a-54a. The court acknowledged the "great scope of the commerce power," *id.* at 37a, recognizing that "the Supreme Court has consistently deferred to

Congressional findings in this respect," *id.* at 40a, and that "Congressional enactments are, of course, presumed constitutional." *Id.* at 45a. The court nevertheless ruled that the statute is invalid. It stated that the interests of the States reflected in the Tenth Amendment support the view "that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion." *Id.* at 46a. In the court's view, the absence of express congressional findings regarding the effect on interstate commerce of the acts proscribed by Section 922(q) required the conclusion that Congress "has not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause." *Id.* at 48a. The court therefore vacated respondent's conviction, holding that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." *Id.* at 53a.[3]

SUMMARY OF ARGUMENT

1. a. Pursuant to the Commerce Clause, Congress is empowered to regulate even intrastate, noncommercial activity that, in the aggregate, exerts a

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[3] The court considered it to be "conceivabl[e]" that a conviction under Section 922(q) "might be sustained if the government alleged and proved that the offense had a nexus to commerce." Pet. App. 53a. The court referred to the parties' stipulation that a federal agent was prepared to testify that respondent's gun had been manufactured outside the State of Texas. *Ibid.* Because the indictment failed to allege a commerce nexus, however, the court declined to consider whether a conviction on an indictment containing such an allegation would be sustainable. *Id.* at 53a-54a.

substantial impact on interstate commerce. Congress need not issue formal findings detailing the nexus between the regulated activity and interstate commerce, nor is it required to identify the Comerce Clause as the source of its power to act. In determining whether particular legislation represents a valid exercise of Congress's commerce power, courts must employ a "rational basis" standard reflecting substantial deference to legislative judgments. Thus, the question in this case is whether Congress could rationally have concluded that gun possession on and near school premises affects interstate commerce.

b. There is an abundant basis from which Congress could reasonably determine that the conduct proscribed by Section 922(q) affects interstate commerce. Through the mechanism of insurance, the economic consequences of violent crime are spread throughout the nation. In addition, violent crime affects interstate commerce by reducing the willingness of other individuals to travel to areas that are perceived to be unsafe. Congress could reasonably determine that these economic impacts, standing alone, establish a connection between incidents of firearm violence and commerce "among the several States." U.S. Const. Art. I, § 8, Cl. 3.

Quite apart from the foregoing economic impacts of firearm violence, Congress had ample basis for concluding that the presence of guns in schools poses an unacceptable threat to the proper functioning of primary and secondary education. Congress had ample basis as well to conclude that disruption of the educational process would have substantial deleterious effects on the national economy. Indeed, throughout the decade that preceded passage of the Gun-Free School Zones Act, the importance of primary and

secondary education to national productivity and economic competitiveness was the subject of extensive national concern and debate.

c. In holding that Congress's enactment of Section 922(q) had exceeded its powers under the Commerce Clause, the court of appeals emphasized the absence of formal findings detailing the nexus between the regulated activity and interstate commerce. That reasoning cannot be reconciled with this Court's precedents, which have made clear that Congress's exercise of the commerce power does not require the issuance of formal findings. This Court has also held repeatedly that rational-basis review does not involve an attempt to determine the chain of reasoning that actually motivated the legislature.

The court of appeals also erred in its reliance on decisions imposing clear-statement requirements in various legislative contexts. Most of the decisions on which the court of appeals relied involved potential incursions directly onto the operations of state governments rather than, as here, regulation of the conduct of private persons. In any event, clear-statement rules require only that Congress make plain the intended scope of its enactments. Congress is not obliged to explain its reasons for acting, to justify its decisions with "findings," or to identify the constitutional source of its authority. Any clear-statement requirement is satisfied in the present case: it is undisputed that Congress intended to proscribe the conduct for which respondent was convicted.

2. For the foregoing reasons, Section 922(q) would be constitutional even if Congress had never heard evidence or issued findings establishing a nexus to interstate commerce. Even if this Court could

appropriately review the "record" before Congress, however, the judicial inquiry would not properly be limited to the hearings and debates on the Gun-Free School Zones Act. In determining the propriety of a particular legislative proposal, Congress may quite properly draw upon the information and expertise that it has acquired in its consideration and enactment of earlier statutory provisions.

Passage of the Gun-Free School Zones Act did not (as the court of appeals believed) represent a substantial departure from earlier federal enactments. Rather, the Act is properly viewed as standing at the intersection of two lines of extensive legislation. Prior to the passage of Section 922(q), Congress had repeatedly acted upon the premise that national productivity and competitiveness depend substantially upon effective primary and secondary education. In addition, by 1990 Congress had acquired extensive information and knowledge regarding the hazards associated with firearms, and it had frequently regulated the transfer and possession of firearms as a means of preventing violent crime. The evidence adduced and findings made in the course of those prior legislative proceedings make clear that the Gun-Free School Zones Act is a permissible exercise of Congress's commerce power.

ARGUMENT

I. BECAUSE CONGRESS COULD REASONABLY HAVE CONCLUDED THAT POSSESSION OF FIREARMS ON AND AROUND SCHOOL PREMISES AFFECTS INTERSTATE COMMERCE, THE GUN-FREE SCHOOL ZONES ACT IS A VALID EXERCISE OF CONGRESSIONAL POWER

A. The Gun-Free School Zones Act Must Be Upheld If Congress Could Reasonably Have Concluded That Possession Of Firearms On Or Near School Premises Will Affect Interstate Commerce

1. It is well established that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *United States* v. *Darby*, 312 U.S. 100, 118 (1941). See also, *e.g.*, *Fry* v. *United States*, 421 U.S. 542, 547 (1975) ("[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations"); *Perez* v. *United States*, 402 U.S. 146, 150 (1971).[4] Indeed, the regulated conduct need not itself

[4] The power to regulate intrastate activity having a substantial effect on interstate commerce is reconfirmed by Congress's constitutional authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its

be commercial: "[E]ven if * * * activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942).[5]

2. It is of no consequence that particular conduct, considered in isolation, has no palpable impact upon interstate commerce. Instead, "[w]here the *class of activities* is regulated and that *class* is within the reach of the federal power, the courts have no power 'to excise as trivial individual instances' of the class." *Perez* v. *United States*, 402 U.S. at 154 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 198 (1968)). Accord *Katzenbach* v. *McClung*, 379 U.S. 294, 300 (1964); *Wickard* v. *Filburn*, 317 U.S. at 127-128.

3. In determining whether a federal statute may be sustained as a proper exercise of Congress's power to regulate interstate commerce, the courts must apply a "rational basis" standard reflecting substantial

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enumerated powers. Art. I, § 8, Cl. 18. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) ("The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement'.") (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870)).

[5] Cf. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 332-333 (1991) ("We have no doubt concerning the power of Congress [under the Commerce Clause] to regulate a peer review process controlling access to the market for ophthalmological surgery in Los Angeles."); *id.* at 333 (Scalia, J., dissenting) (agreeing with Court's conclusion regarding Congress's constitutional authority).

deference to legislative judgments. See *Maryland* v. *Wirtz*, 392 U.S. at 198 (test is "whether there is a rational basis for regarding [challenged statutes] as regulations of commerce among the States"). "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981). "The pertinent inquiry therefore is * * * whether Congress could rationally conclude that the regulated activity affects interstate commerce." *Id.* at 324.

4. The rationality of federal legislation under the Commerce Clause does not require particularized congressional "findings" detailing the nexus between the regulated activity and interstate commerce.[6] In sustaining Title II of the Civil Rights Act of 1964 as a valid exercise of Congress's power to regulate interstate commerce, the Court noted that "no formal findings were made, which of course are not necessary." *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964). Similarly in *Maryland* v. *Wirtz*, the Court stated:

> A major contention of the appellants in the present case is that the legislative history of the

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[6] Nor is Congress required, either in the text of the statute or in its legislative history, to identify the Commerce Clause as the source of its power to act. "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Miller Co.*, 333 U.S. 138, 144 (1948). Accord *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983).

> amendments now before us lays no factual predicate for extensions of the original Act. To the extent that this is true, it is quite irrelevant. The original Act stated Congress' findings and purposes as of 1938. Subsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered. *We are not concerned with the manner in which Congress reached its factual conclusions.*

392 U.S. at 190 n.13 (emphasis added). Accord *Perez* v. *United States*, 402 U.S. at 156; *United States* v. *Stillwell*, 900 F.2d 1104, 1111 (7th Cir.), cert. denied, 498 U.S. 838 (1990); *United States* v. *Evans*, 928 F.2d 858, 862 (9th Cir. 1991); *Morgan* v. *Secretary of HUD*, 985 F.2d 1451, 1455 (10th Cir. 1993); *Seniors Civil Liberties Ass'n* v. *Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992).

This rule is consistent with the legal principles generally applicable to rational-basis review of federal legislation. This Court has made clear that

> because [the Court] never require[s] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

FCC v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2102 (1993) (citations, brackets, and internal quota-

tion marks omitted).[7] Thus, judicial inquiry into the rationality of legislation "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938). Accord *United States* v. *Evans*, 928 F.2d at 862 (test is "whether a reasonable Congress could find that the class of activity regulated affects interstate commerce").[8]

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[7] Although *Beach Communications* was an equal protection case, the principles enunciated therein are equally applicable to Commerce Clause analysis. The question whether a challenged statute may be upheld as regulation of interstate commerce (like questions concerning the propriety of legislative distinctions not implicating suspect classes) is reviewable under a rational-basis standard. See pages 13-14, *supra*. Thus, the fundamental principles set forth in *Beach Communications*—including the statements that the Court "never require[s] a legislature to articulate its reasons for enacting a statute" and that the absence of "legislative facts" or a formal "record" therefore "has no significance in rational-basis analysis," 113 S. Ct. at 2102—are applicable by their terms to Commerce Clause review. These principles ultimately rest on constitutional separation of powers considerations and on the fact that Article I of the Constitution makes no mention of legislative history or findings in prescribing the requirements for the enactment of federal laws. Rather, federal legislation takes effect upon a majority vote of each House and signature by the President, or upon a two-thirds vote of each House to override a veto.

[8] We acknowledge that the Court has on occasion phrased the applicable standard as one of "defer[ence] to a congressional finding that a regulated activity affects interstate commerce." *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990); see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."). We do not believe, however, that such statements should be read as casting doubt

B. Congress Could Rationally Conclude That Gun Possession On Or Near School Grounds Affects Interstate Commerce

There is, in our view, an abundant basis from which Congress could rationally conclude that the conduct proscribed by Section 922(q) affects commerce "among the several States."

1. Congress could rationally conclude that incidents of violent crime, wherever they occur, can be expected to affect the functioning of the national economy. The economic consequences of criminal behavior are substantial[9] and, through the mechanism of insurance, spread throughout the population. See *United States* v. *Evans*, 928 F.2d 858, 862 (9th Cir. 1991) (finding it "reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry").[10]

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upon the Court's prior and subsequent holdings that express findings to that effect are unnecessary. In other words, the congressional "finding" can very properly be—and often is—merely implicit in the enactment itself. Indeed, the legislative materials cited by the Court in *Preseault*, see 494 U.S. at 17-18, include no findings regarding impacts on interstate commerce and do not identify the Commerce Clause as the source of congressional power to enact the statute in question.

[9] See, *e.g.*, Ruttenberg, *The Limited Promise of Public Health Methodologies To Prevent Youth Violence*, 103 Yale L.J. 1885, 1887 n.11 (1994) (noting that "[o]ne study calculated the average cost of hospital treatment for gunshot victims at $13,200, with individual cases ranging as high as $495,000") (internal quotation marks omitted). See also *id.* at 1891-1893 (discussing dramatic increase during 1980s in juvenile involvement—both as perpetrators and as victims—in firearm violence).

[10] Cf. *United States* v. *Trioli*, 308 F. Supp. 358, 360 (D. Mass. 1970) ("While there may be differences of opinion as to

In addition, violent crime affects interstate commerce by reducing the willingness of other individuals to travel to areas within the country that are perceived to be unsafe. Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 253 (1964) (Title II of the 1964 Civil Rights Act is rationally related to interstate commerce because the uncertainty of black travelers regarding the availability of adequate transient accommodations "had the effect of discouraging travel on the part of a substantial portion of the Negro community"). Congress could reasonably determine that these economic impacts, standing alone, establish a connection between incidents of firearm violence and commerce "among the several States." Congress also could reasonably determine that a prohibition on gun possession on and around school premises would reduce the incidence of firearm violence.[11]

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whether traffic in guns or traffic in drugs poses the greater threat to the public safety, it is well within the power of Congress to find that because of the inherently dangerous nature of both, each, when used or abused in intrastate commerce, clearly affects interstate commerce.").

[11] There are at least four related bases upon which Congress might rationally have chosen to single out gun possession in and near schools for special restrictions. First, Congress might reasonably believe that the presence of guns is particularly likely to lead to violence in a congested area populated chiefly by juveniles. As a representative of the American Academy of Pediatrics testified at hearings on the Gun-Free School Zones Act, "[b]ased on our background in public health and preventive medicine, we conclude that children simply cannot coexist in the same environment with firearms. * * * A public health principle that has withstood the test of time is that you must separate in time and space children and the things that will surely harm them. It's true for the measles virus, it's true

2. Quite apart from the foregoing economic impacts of firearm violence, Congress had ample basis for concluding that the presence of guns in schools poses a substantial and unacceptable threat to the educational process. A representative of the Center to Prevent Handgun Violence testified that "[w]e all know that our children can't learn basic skills that

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for drain cleaner, it's true for a contaminated supply of drinking water, and it's true for guns." *House Hearings* at 51. Second, Congress could rationally determine that primary and secondary school students should be given enhanced protection against firearm violence. Cf. *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982) (recognizing "compelling" governmental interest in protecting the welfare of minors). Third, Congress might reasonably believe that the presence of guns in or near the schools would discourage well qualified persons from entering or staying in the teaching profession. See *House Hearings* at 44 (representative of National Education Association and National PTA testified that "fear of violence impedes the ability of schools to attract and retain qualified school personnel"). Finally, Congress might reasonably have concluded that there are few *legitimate* reasons to possess firearms on and around school grounds, and therefore a reduced need to balance the desire to prevent violence against countervailing concerns.

Congress's decision to prohibit gun possession at some locations while permitting it in others must be sustained so long as there is a rational basis for the distinction. "The process of legislating often involves tradeoffs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of Congress' ends does not render it irrational." *Preseault* v. *ICC*, 494 U.S. 1, 19 (1990). Cf. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) ("a legislature 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations' ") (quoting *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976)); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

are necessary for adulthood if they attempt to learn in an environment of fear. Rather than concentrating on English, math, and the sciences, many students are learning other lessons—lessons in basic survival." *House Hearings* at 39. She described the current educational environment in many parts of the country as one "where schools teach students the old nuclear war duck-and-cover drills to protect them from gunfire coming from the city streets, where schools in 15 States search students with metal detectors, and where an increasing number of school systems are using gun sniffing dogs and SWAT teams." *Ibid.* Similarly, a representative of the National Education Association and National PTA testified that "[t]he threat of violence is a significant factor in the dropout rate, the stress related to fear of violence threatens the educational goals related to student achievement, and fear of violence impedes the ability of schools to attract and retain qualified school personnel." *Id.* at 44. He noted that "[s]tudents in Chicago, New York, Miami, and elsewhere are exhibiting signs of 'post-traumatic stress syndrome.' Young children exposed to violence in the schools and in the neighborhood have become numb—seemingly immune to sights of brutality in the same way as the children of Belfast, Beirut, or Johannesburg." *Id.* at 46-47. A representative of the American Academy of Pediatrics testified that after exposure to violent episodes "[c]hildren will sleep poorly, children will eat poorly, some children will even grow poorly. Children will be unable to do their schoolwork, will be unable to enjoy life. And it's a process that can be well documented, not only in the year after the occurrence, but even for years later." *Id.* at 63. See also Ruttenberg, *The Limited Promise of Public*

Health Methodologies To Prevent Youth Violence, 103 Yale L.J. 1885, 1897 & nn.60-67 (1994) (discussing scholarly research documenting deleterious effects upon juveniles of exposure to violence).[12]

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[12] A statement issued by the National PTA in 1990 noted that the Gun-Free School Zones Act "is consistent with one of the national education goals set forth by the nation's governors and President—that 'by the year 2000, every school in America will be free of drugs and violence and [will] offer a disciplined environment conducive to learning.'" *House Hearings* at 77. The National Education Goals for the year 2000, developed by the President and representatives of the National Governors' Association, were announced in February 1990. See 26 Weekly Comp. Pres. Doc. 314-316 (Feb. 26, 1990). The National Education Goals Panel has emphasized the connection between school safety and educational achievement, observing that students in violent or drug-ridden schools "are much less likely to meet the Goals we set for them—to stay in school, perform at higher academic levels, and excel in mathematics and science." *The National Education Goals Report: Building a Nation of Learners* 44 (U.S. Gov't Printing Office 1992).

Earlier studies assessing the effects of student fear on academic performance are analyzed in Wayne & Rubel, *Student Fear in Secondary Schools*, 14 The Urb. Rev. 197 (1982). The authors conclude that students' "apprehensiveness" is inversely correlated to their grade-point averages. *Id.* at 204-205. They observe that "students are frequently led by apprehensiveness to avoid some school locations and that, in extreme cases, fear of the school setting makes students avoid school altogether." *Id.* at 230. They assert as well that fear of violence may have more pervasive effects on student perceptions of the school and their relation to it: "Apprehensiveness among students has an obvious impact upon the business of education: It reduces concentration on assigned tasks, creates an atmosphere of mistrust, and undermines school morale. More subtly, the school administrator's inability to reduce fear directly tells students that staff are not in control of the school's social climate—that student disorder is more powerful than the adult call for order." *Id.* at 230-231.

Congress had ample basis as well to conclude that such impediments to the educational process would have substantial deleterious effects on the functioning of the national economy. Indeed, the importance of primary and secondary education to national productivity and economic competitiveness was the subject of extensive national concern and debate throughout the decade that preceded passage of the Gun-Free School Zones Act.[13] "The impetus to improve the quality of elementary and secondary education gained a national focus in 1983, when more than 10 major reports or studies on school problems were released." *The Federal Role in Improving Elementary and Secondary Education* 7 (Congressional Budget Office May 1993). These reports reflected general agreement that "[t]oo many students are graduating from high school without the knowledge and skills necessary to be productive workers in a global economy." *Id.* at 8. Perhaps the best-known of these studies asserted that "[k]nowledge, learning, information, and skilled intelligence are the new raw materials of international commerce and are today spreading throughout the world as vigorously as miracle drugs, synthetic fertilizers, and blue jeans did earlier. If only to keep and improve on the slim competitive edge we still retain in world markets, we must dedicate ourselves to the reform of our educational system." National Commission on

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[13] As we explain at pages 35-40, *infra*, the link between education and American productivity was the subject of extensive congressional findings, and the premise for numerous enactments of federal legislation, throughout the 1980s.

Excellence in Education, *A Nation at Risk* 7 (Apr. 1983).[14]

In subsequent years various task forces and commissions continued to emphasize the importance of primary and secondary education to national productivity and competitiveness. For example, the National Commission on Jobs and Small Business emphasized that "[w]e must act on our understanding that education bears directly on our economic health and well being." National Commission on Jobs and Small Business, *Making America Work Again: Jobs, Small Business, and the International Challenge* 16 (1987). See also *id.* at 17 ("the rate of technological change in American work life portends a deepening crisis in the skill levels of our workforce"), 29. Another task force, focusing on the plight of

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[14] Other reports issued that year offered similar conclusions. One task force chaired by North Carolina Governor James B. Hunt, Jr., stated: "It is the thesis of this report that our future success as a nation—our national defense, our social stability and well-being and our national prosperity—will depend on our ability to improve education and training for millions of individual citizens." Task Force on Education for Economic Growth, Education Commission of the States, *Action for Excellence: A Comprehensive Plan to Improve Our Nation's Schools* 14 (1983). See also, *e.g.*, *id.* at 18 ("it is our judgment that a high general level of education is perhaps the most important key to economic growth"). A report to the President prepared by a panel of business and academic leaders noted that "poorly prepared and ill-trained workers ultimately make substandard contributions to productivity growth. A growing body of evidence indicates that many American workers lack fundamental skills in mathematics, science, critical thinking and verbal expression—primarily because of a shortage of well-trained faculty in the nation's public schools." Business-Higher Education Forum, *America's Competitive Challenge: The Need for a National Response* 22 (Apr. 1983).

"educationally disadvantaged" children, asserted that "[i]f present trends continue without corrective actions, American business will confront a severe employment crisis. This scarcity of well educated and well qualified people in the work force will seriously damage this country's competitive position in an increasingly challenging global marketplace." Committee for Economic Development, *Children in Need: Investment Strategies for the Educationally Disadvantaged* 4 (1987). A commission assembled by the Massachusetts Institute of Technology expressed similar views. See MIT Commission on Industrial Productivity, *Made in America: Regaining the Productive Edge* (1989). In discussing the forms of investment that it deemed "necessary to achieve a higher level of productive performance," the Commission asserted that "Americans must be provided with a fundamentally different education from what they receive today. Basic schooling from kindergarten through high school is seriously deficient to the extent that it leaves large numbers of its graduates without basic skills in reading, writing, and mathematics." *Id.* at 143. The Commission observed that "[t]he task of upgrading the primary and secondary schools is probably the single most important challenge facing the country." *Id.* at 152. See also *id.* at 21-22, 35-36, 81.[15]

Thus, during the decade prior to passage of the Gun-Free School Zones Act, there emerged a national

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[15] The day after its release the MIT Commission report was the focus of Senate committee hearings. See *Restoring American Productivity: The Role of Education and Human Resources: Hearing Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. (1989).

consensus regarding the importance of primary and secondary education to American productivity and competitiveness. Against this backdrop, there can be no doubt that "Congress could rationally conclude that [gun possession in schools] affects interstate commerce." *Hodel* v. *Indiana*, 452 U.S. at 324.[16]

C. The Court Of Appeals Applied Erroneous Legal Standards In Ruling That Congress Had Failed To Establish A Sufficient Predicate For Its Decision To Prohibit Gun Possession On Or Near School Grounds

The court of appeals did not deny that Congress could rationally have concluded that the conduct proscribed by Section 922(q) would affect interstate commerce. Rather, the court emphasized the absence of formal congressional findings, noting that "[n]either the [Gun-Free School Zones] act itself nor its legislative history reflect[s] any Congressional determination that the possession denounced in section 922(q) is in any way related to interstate commerce or its regulation, or, indeed, that Congress was exercising its powers under the Commerce

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[16] This Court has previously recognized Congress's power under the Commerce Clause to protect industrial productivity by acting to prevent labor strife. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937). Federal efforts to enhance the competence of the national work force bear a similar nexus to interstate commerce. This conclusion is not altered by the fact that the manner in which primary and secondary education affects workplace productivity might be characterized as "indirect." *Wickard* v. *Filburn*, 317 U.S. at 125. Cf. *Preseault* v. *ICC*, 494 U.S. 1, 19 (1990) (Congress may act under the Commerce Clause to protect railroad right-of-way for possible future railroad use "even if no future rail use for it is currently foreseeable").

Clause." Pet. App. 49a. The court asserted as well that "[c]ourts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding." *Id.* at 44a.

In thus treating Congress as comparable to an agency or trial court that must create a record suitable for appellate review, the court of appeals fundamentally misapprehended the nature of Congress's authority under the Commerce Clause and the role of the federal courts in discerning the legitimate bounds of that authority. The court of appeals' approach ignores this Court's clear holdings that Congress need not issue particularized findings in order to legislate under the Commerce Clause. See pages 14-15, *supra*. It ignores as well this Court's repeated admonitions that rational-basis review does *not* involve an attempt to determine the chain of reasoning that actually motivated the legislature. See, *e.g.*, *Beach Communications*, 113 S. Ct. at 2102 (citing cases).[17]

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[17] The court of appeals stopped short of imposing an absolute requirement that Congress's exercise of the commerce power be supported by formal findings, suggesting that "[c]onceivably, a purely informational void could be filled by evidence in court of the same general kind that might have been presented to a Congressional committee or the like concerning any relationship between the legislation and interstate commerce." Pet. App. 44a n.44. That approach, however, cannot be reconciled with this Court's recognition that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 113 S. Ct. at 2102.

The court of appeals purported to "draw support for [its] conclusion concerning the importance of Congressional findings from recent holdings that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion." Pet. App. 46a. The court of appeals principally relied on this Court's decisions in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989); *Dellmuth* v. *Muth*, 491 U.S. 223 (1989); *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991); and *United States* v. *Bass*, 404 U.S. 336 (1971). See Pet. App. 46a-48a. Those cases, however, are readily distinguishable.

1. This Court's decisions in *Union Gas*, *Dellmuth*, and *Gregory* involved potential incursions directly onto the operations of state governments. *Union Gas* and *Dellmuth* presented the question whether state agencies could be held liable for monetary damages notwithstanding the Eleventh Amendment; *Gregory* involved the application of federal law to the State's establishment of qualifications for its own judiciary, "a decision of the most fundamental sort for a sovereign entity." 111 S. Ct. at 2400. These decisions reflect the Court's recognition that special constitutional problems may be posed when Congress attempts to subject the States themselves to statutory duties, prohibitions, or liabilities. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 (1985) ("the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States"); *Gregory*, 111 S. Ct. at 2401 ("the States retain substantial sovereign powers under our constitutional scheme"); *New York* v. *United States*, 112 S. Ct. 2408, 2421 (1992) ("the Constitution has never been understood to confer

upon Congress the ability to require the States to govern according to Congress' instructions").

Congress has far greater latitude, however, when its Acts are applied to the activities of private parties who are incidentally subject to concurrent state regulation. "In providing for a stronger central government, * * * the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York* v. *United States*, 112 S. Ct. at 2423. Thus, "Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States." *Id.* at 2421; see also *id.* at 2430-2431, 2435; pages 31-32, *infra*. Section 922(q) imposes no affirmative obligations upon state or local governmental units, nor does it limit the autonomy of state and local authorities with respect to curricular choices or allocation of resources. In important respects the statute *incorporates* state and local policy choices by exempting individuals licensed to possess firearms under state or local law, 18 U.S.C. 922(q)(1)(B)(ii) (Supp. IV 1992), individuals acting pursuant to contractual agreements with the school in question, 18 U.S.C. 922(q)(1)(B)(v) (Supp. IV 1992), and law enforcement officers acting in their official capacity, 18 U.S.C. 922(q)(1)(B)(vi) (Supp. IV 1992).

Indeed, while Congress possesses unquestioned authority under the Commerce Clause to preempt state law, see, *e.g.*, *New York* v. *United States*, 112 S. Ct. at 2435; *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 290, Congress has taken care in the present context to minimize even this limited form of intrusion on state prerogatives. The Gun-Free School Zones Act provides that "[n]othing in [18 U.S.C. 922(q)] shall be construed as

preempting or preventing a State or local government from enacting a statute establishing gun-free school zones * * *," 18 U.S.C. 922(q)(3) (Supp. IV 1992); the statute thus supplements rather than supplants the efforts of state and local authorities to address the problem of firearm violence in the nation's schools. Congress's intent to minimize preemption of state firearms laws is further evidenced by 18 U.S.C. 927, which states that "[n]o provision of this chapter [18 U.S.C. 921-930] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on any subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together."[18]

2. For the foregoing reasons, clear-statement requirements are ordinarily imposed in contexts, such as the Eleventh Amendment, where the constitutional prerogatives of the States are directly implicated. In any event, the court of appeals' reasoning fundamentally misconstrues the requirement that Congress must, under certain circumstances, "express its intent * * * in a perfectly clear fashion." Pet. App. 46a. Clear-statement rules, where they apply, require only that Congress make

[18] Of course, Section 922(q) does displace state policy choices in the limited sense that its prohibitions apply even in States that have chosen not to outlaw the conduct in question. But that exercise of congressional power—reflecting no more than "the truism that States may not pre-empt federal law," *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990)—intrudes upon state autonomy only in a manner that the Constitution directly authorizes.

unmistakably plain the intended scope of its enactments. Congress is not obliged to explain its reasons for legislating,[19] to justify its decisions with "findings,"[20] or to identify the constitutional source of its authority to act. See *EEOC* v. *Wyoming*, 460 U.S. at 243 n.18.[21]

In the present case, any clear-statement requirement is satisfied: it is undisputed that Congress

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[19] Cf. *Pennsylvania* v. *Union Gas Co.*, 491 U.S. at 30 (Scalia, J., concurring in part and dissenting in part) (in applying clear-statement rules, the Court's task is "not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective —but rather to give fair and reasonable meaning to the text of the United States Code").

[20] Cf. *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 19 (1981) (statutory provision upon which plaintiffs relied "is simply a general statement of 'findings' and, as such, is too thin a reed to" satisfy clear-statement requirement). This Court has also held that clear-statement requirements generally cannot be satisfied by legislative history, no matter how directly it addresses the matter in question. See *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992). The Fifth Circuit's approach to Section 922(q), by contrast, ignores the clarity of the prohibition in the statutory text and focuses instead on the purported absence of extrinsic materials evidencing Congress's reasons for acting.

[21] Cf. *Dellmuth* v. *Muth*, 491 U.S. at 233 (Scalia, J., concurring) (clear-statement requirement for congressional abrogation of Eleventh Amendment immunity "does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment"); *Pennsylvania* v. *Union Gas Co.*, 491 U.S. at 56 n.7 (White, J., concurring in the judgment in part and dissenting in part) (same).

intended to proscribe the conduct for which respondent was convicted. This case is thus similar to *United States* v. *Culbert*, 435 U.S. 371 (1978), in which the Court rejected a proposed narrowing construction of 18 U.S.C. 1951(a) (1976). The Court quoted with approval its prior statement that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 435 U.S. at 379 (quoting *United States* v. *Bass*, 404 U.S. at 349). The Court held, however, that this "maxim[] of statutory construction" would "only apply when we are uncertain about the statute's meaning." 435 U.S. at 379 (internal quotation marks omitted). The Court declined to adopt a narrowing construction of Section 1951(a), explaining that "here Congress has conveyed its purpose clearly, and we decline to manufacture ambiguity where none exists." 435 U.S. at 379. "[R]ule[s] of statutory construction [used] * * * to divine the meaning of otherwise ambiguous statutory intent * * * simply have no relevance to the question of whether" Congress has legitimately exercised its powers under the Commerce Clause. *EEOC* v. *Wyoming*, 460 U.S. at 244 n.18.

3. Finally, there is no basis for the court of appeals' reliance on the Tenth Amendment (see Pet. App. 45a, 48a-49a) in support of its decision to invalidate Section 922(q). "The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 291. The Tenth Amendment does, we

recognize, place limits on Congress's ability to impose requirements directly upon state governments. See *New York* v. *United States*, *supra*; see also *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities*). Those limitations have no relevance, however, to congressional regulation of private activity. See *National League of Cities*, 426 U.S. at 845 (distinguishing between "the authority of Congress to enact laws regulating individual businesses" and the "exercise of congressional authority directed, not to private citizens, but to the States as States"); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 287 ("a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* * * * [requires] a showing that the challenged statute regulates the 'States as States'"); see also *New York* v. *United States*, 112 S. Ct. at 2421, 2423, 2430-2431, 2435.[22]

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[22] Particularly inexplicable is the court of appeals' reliance (see Pet. App. 45a) on *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938), for the proposition that the presumption of constitutionality of an Act of Congress has reduced force when Congress is alleged to have exceeded its powers under the Commerce Clause. The statute at issue in *Carolene Products* was challenged as exceeding congressional power under the Commerce Clause, and the Court sustained the legislation. 304 U.S. at 147-148. The Court's suggestion that in different circumstances "[t]here may be narrower scope for operation of the presumption of constitutionality," *id.* at 152 n.4, therefore quite plainly refers to questions *other than* those regarding the scope of the commerce power.

Nor is there any basis for the court of appeals' suggestion that the Second Amendment "may be something of a brooding

II. EVEN IF JUDICIAL ASSESSMENT OF THE "RECORD" BEFORE CONGRESS WERE APPROPRIATE, THAT "RECORD" FULLY SUPPORTS THE CONCLUSION THAT GUN POSSESSION IN AND NEAR SCHOOLS AFFECTS INTERSTATE COMMERCE

For the reasons we have stated, we believe that Section 922(q) would be constitutional even if Congress had never heard evidence or issued findings establishing a nexus between gun possession in schools and interstate commerce. Even if it were appropriate for this Court to review the "record" before Congress, however, the judicial inquiry would not properly be limited to the hearings and debates on the Gun-Free School Zones Act. As Justice Powell explained in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980):

> The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After

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omnipresence here." Pet. App. 45a n.46. Respondent does not contend that his conduct was protected by the Second Amendment, and any such contention would be insubstantial. See *United States* v. *Miller*, 307 U.S. 174, 178 (1939).

> Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Id. at 502-503 (Powell, J., concurring).[23]

The court of appeals recognized this principle but deemed it irrelevant to the present case, see Pet. App. 50a n.49, asserting that "[no] prior federal enactments or Congressional findings speak to the subject matter of section 922(q) or its relationship to interstate commerce." *Id.* at 49a. That assertion was incorrect. Although "the primary public responsibility for education is reserved respectively to the States and the local school systems," 20 U.S.C. 3401(4), Congress has long recognized that the performance of the nation's schools implicates substantial federal interests as well.[24] In particular, well before the enactment of Section 922(q), Congress had repeatedly acted upon the premise that national productivity and competitiveness depend substantially upon effective primary and secondary education. Throughout the 1980s Congress heard voluminous testimony supporting that conclusion; it repeatedly issued findings to

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[23] Cf. *Maryland* v. *Wirtz*, 392 U.S. at 190 n.13 ("The original Act stated Congress' findings and purposes as of 1938. Subsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered.").

[24] See, *e.g.*, Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979); S. Rep. No. 49, 96th Cong., 1st Sess. 1 (1979) ("Establishment of a Department of Education would greatly increase the status and visibility of education in the Federal government and give it rightful recognition as a fundamental activity of American life.").

that effect; and it legislated frequently on the basis of that assumption. In addition, by 1990 Congress had acquired extensive information regarding the hazards associated with firearms. Thus, even if judicial examination of the "record" before Congress were appropriate, abundant evidence in that record supports the conclusion that gun possession on and near school premises affects interstate commerce.

A. Prior To Passage Of The Gun-Free School Zones Act, Congress Had Repeatedly Recognized The Importance Of Primary And Secondary Education To National Productivity And Competitiveness

1. In March and April 1983, a Senate subcommittee conducted extensive hearings regarding problems affecting primary and secondary education. See *Education for Economic Security Act: Hearings Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. (1983) (hereinafter *1983 Senate Hearings*). In his opening statement Senator Stafford acknowledged that "education is principally a State and local responsibility" but observed that "there is also the national problem of our ability to cope generally with rapidly changing technology and changing labor-force requirements, and a pressing national need to improve our international economic competitiveness. These national problems demand a response at the Federal level." *Id.* at 1. Throughout the hearings Senators and witnesses appearing before the subcommittee repeatedly emphasized the importance of education—and, in particular, education in mathematics and

science—to American productivity and competitiveness.[25]

The following year Congress passed the Education for Economic Security Act, Pub. L. No. 98-377, 98 Stat. 1267 (1984). The Act provided financial assistance to primary, secondary, and postsecondary schools to improve instruction in mathematics and science. The findings set forth in the pertinent Senate Report began with the assertion that "[t]he United States faces an educational challenge of immense proportions. We face a crisis in the quality of the mathematics and science education, which is increasingly necessary for our citizenry to perform the demanding jobs which our prosperity, our security, and our liberty require." S. Rep. No. 151, 98th Cong., 1st Sess. 1 (1983). The report further noted that "[t]estimony before the Subcommittee on Education, Arts and Humanities clearly demonstrates that a lack of personnel competent in mathematics and science is among the most critical problems confronting America's high technology companies." *Id.* at 3. The House Report stated that deficiencies in mathematics and science education

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[25] See, *e.g.*, *1983 Senate Hearings* at 9 (Senator Domenici), 12 (Senator Hart), 21 (Senator Chiles), 30 (Dr. F. James Rutherford, Chief Education Officer, American Association for the Advancement of Science), 82 (Senator Quayle), 271 (Senator Hatch), 276 (Secretary of Education Bell), 372-373 (E.K. Fretwell, Jr., Chancellor, University of North Carolina at Charlotte), 477 (Gilbert D. Johnson, Electronic Data Systems, Inc.), 484 (Dr. Harry Handler, Superintendent, Los Angeles Unified School District), 552-553 (Arthur R. Pontarelli, Rhode Island Commissioner of Elementary and Secondary Education), 626-627 (Senator Tsongas), 710 (David A. Hamburg, M.D., President, Carnegie Corp. of New York).

"threaten to comprimise [*sic*] America's stature in the international marketplace, further weaken our industrial base, and undermine our national defense," H.R. Rep. No. 6, 98th Cong., 1st Sess. Pt. 1, at 14 (1983), and observed that "[o]ur nation is already paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling." *Id.* at 19.

2. In 1988 Congress passed the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments, Pub. L. No. 100-297, 102 Stat. 130, an omnibus bill reauthorizing and expanding numerous programs of federal financial assistance for primary and secondary education. The Senate Report characterized the Act as "a prudent investment in our country's future," noting that "[t]here is growing recognition in every sector of society that such an investment in education is critical to our economic strength and national security." S. Rep. No. 222, 100th Cong., 1st Sess. 2 (1987).[26] The Report repeatedly emphasized the connections between the performance of primary and secondary schools, the ability of business and industry to assemble a skilled work force, and the maintenance of America's competitive position in the world economy. See, *e.g.*, *id.* at 3, 8, 16, 41, 63, 65-66, 75, 82, 85. The House Report expressed similar con-

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[26] The Senate Report quoted with approval a recent task force report stating that "[i]f present trends continue without corrective actions, American business will confront a severe employment crisis. This scarcity of well-educated and well-qualified people in the work force will seriously damage this country's competitive position in an increasingly challenging global marketplace." S. Rep. No. 222, *supra*, at 2.

clusions. See H.R. Rep. No. 95, 100th Cong., 1st Sess. 10-11, 61, 67 (1987).[27]

During the same year Congress passed the Education and Training for a Competitive America Act of 1988, enacted as Title VI of the Omnibus Trade and Competitiveness Act of 1988. See Pub. L. No. 100-418, 102 Stat. 1107, 1469. The statute included numerous findings regarding the nexus between education and American competitiveness. Thus, Congress found, *inter alia*, that "the relationship between a strong and vibrant educational system and a healthy

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[27] The connection between education and national productivity was attested to by senior officers of five major U.S. corporations, who appeared at a joint Senate-House hearing to express their support for reauthorization of expiring federal education programs. See *2 Reauthorization of Expiring Federal Elementary and Secondary Education Programs: Joint Hearing Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor and the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. (1987). The witnesses noted that "[d]espite the diversity of our businesses and our regional locations, we are agreed that the quality of public schooling we provide to all our children, including disadvantaged children, will play a major role in the ability of the United States to develop a competitive economy and a strong society." *Id.* at 4. They stated that underinvestment in education "has severe consequences," citing one estimate that "the cost to private industry of retraining American workers who are not adequately educated in basic reading, writing, and computational skills is $2 billion per year." *Id.* at 5. See also *id.* at 32 ("we need knowledgeable, well-educated, highly skilled employees if our business is to succeed"); 42 ("the educational system perhaps is one of the most important underpinnings of the restoring of industrial competitiveness in this country in the future"); 49-50.

national economy is inseparable in an era in which economic growth is dependent on technology and is imperiled by increased foreign competition"; that "our standing in the international marketplace is being further eroded by the presence in the workforce of millions of Americans who are functionally or technologically illiterate or who lack the mathematics, science, foreign language, or vocational skills needed to adapt to the structural changes occurring in the global economy"; and that "restoring our competitiveness and enhancing our productivity will require that all workers possess basic educational skills and that many others possess highly specific skills in mathematics, science, foreign languages, and vocational areas." *Id.* at 1469-1470.

3. Two years later Congress passed the School Dropout Prevention and Basic Skills Improvement Act of 1990, Pub. L. No. 101-600, 104 Stat. 3042.[28]

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[28] During the years 1988-1990, Congress continued to gather evidence regarding the nexus between education and national competitiveness. See, *e.g.*, *Restoring American Productivity: The Role of Education and Human Resources: Hearing Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. (1989); *U.S. Power in a Changing World: Report Prepared for the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 43-66 (1990).

President Bush and the nation's Governors recognized this nexus as well. A joint statement issued at the conclusion of the Education Summit (involving the President and the National Governors' Association) in September 1989 asserted that "as [a] Nation we must have an educated workforce, second to none, in order to succeed in an increasingly competitive world economy." 25 Weekly Comp. Pres. Doc. 1487 (Oct. 6, 1989). The Education Summit led to the announcement, five months later, of the National Education Goals for the year 2000. See

Included in the Act was the finding that "in order for the Nation to regain its economic competitiveness, each child in the United States must be educated to his or her greatest potential and must be encouraged to finish secondary school." § 2(a)(2), 104 Stat. 3042. See also Excellence in Mathematics, Science, and Engineering Education Act of 1990, Pub. L. No. 101-589, § 101(a)(5), 104 Stat. 2883 (finding that "the achievement * * * of scientific and mathematical literacy by all Americans is an essential goal of all efforts to strengthen American competitiveness").

B. Prior To Passage Of The Gun-Free School Zones Act, Congress Had Frequently Regulated The Transfer And Possession Of Firearms As A Means Of Preventing Violent Crime

As we explain above, Congress by 1990 had accumulated voluminous evidence indicating that threats to the effective operation of American primary and secondary schools would have substantial effects upon the national economy. Congress had a substantial basis as well to conclude that the presence of firearms on and near school premises would undermine the schools' performance of their educational mission. The hearings on the Gun-Free School Zones Act featured extensive testimony regarding the deleteri-

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note 12, *supra*. The President subsequently explained that "[w]e know that we can't remain competitive or remain a world-class economy without first-class schools. So, we got together with the Governors and adopted national goals * * *. And if these work and if we're successful, * * * we're going to have * * * a return on our investment in expanded opportunity, more jobs, and a higher standard of living for Americans." 26 Weekly Comp. Pres. Doc. 424 (Mar. 15, 1990).

ous influence of school violence upon the educational process. See pages 4-5, 19-21, *supra*.[29] More generally, by 1990 Congress had acquired considerable experience in regulating the transfer and possession of firearms as a means of preventing violent crime.

1. Although "there is a long tradition of widespread lawful gun ownership by private individuals in this country," *Staples* v. *United States*, No. 92-1441 (May 23, 1994), slip op. 10, the right to procure and possess firearms has not been unrestricted. For more than half a century Congress has recognized that the destructive capabilities of firearms provide a basis for federal regulation of their transfer and possession. On that premise Congress has, *inter alia*, required that all firearms dealers be licensed by the federal government, 18 U.S.C. 922(a)(1); prohibited such dealers from selling firearms to juveniles, 18 U.S.C. 922(b)(1); prohibited the transfer of firearms to disqualified persons such as convicted felons, 18 U.S.C. 922(d); prohibited possession of any machinegun that was not lawfully possessed before enactment of the provision, 18 U.S.C. 922(*o*); prohibited possession of firearms not detectable by typical airport metal detectors, 18 U.S.C. 922(p); prohibited the transfer of a firearm knowing that it will be used in a crime of violence or drug trafficking crime, 18 U.S.C. 924(g) (Supp. IV 1992); and prohibited the possession of firearms within a federal facility, 18 U.S.C. 930 (1988 & Supp. IV 1992).

2. These statutory restrictions are grounded in express congressional findings regarding the de-

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[29] See also *Children and Guns: Hearings Before the House Select Comm. on Children, Youth, and Families*, 101st Cong., 1st Sess. (1989).

structive capabilities of firearms and their nexus to violent crime. For example, in enacting Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 225 (1968), Congress found that "the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the function of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States." Pub. L. No. 90-351, § 901(a)(2), 82 Stat. 225. Congress found in addition that "there is a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior." § 901(a)(6), 82 Stat. 225. The Senate Report accompanying the legislation observed that "[t]he principal purposes of title IV are to aid in making it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States." S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968).

3. Although the court of appeals recounted at length the history of federal firearms legislation, see Pet. App. 9a-36a, it found these prior enactments to be irrelevant, concluding that each of the activities previously regulated involved some nexus to interstate commerce that is absent from the Gun-Free

School Zones Act.[30] The differences among these statutory provisions, however, should not obscure the fact that they are based upon a common premise. Congress has repeatedly recognized that the presence of guns in the wrong hands and the wrong places can have destructive and destabilizing effects. And it has legislated repeatedly to address the potential consequences of firearm violence where those consequences substantially affect matters of federal concern.[31]

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[30] The court concluded that licensing requirements for firearms dealers are distinguishable from restrictions on possession; it based that conclusion on Congress's finding that the former were "necessary to adequate federal control of interstate and foreign commerce in firearms." Pet. App. 21a. Section 922(*o*) was distinguished on the ground that it is "restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported *after* enactment of the" statute. Pet. App. 26a. The court noted that "Section 922(p)'s employment of the standard of 'x-ray machines commonly used at airports' plainly reflects the act's interstate commerce related purpose and nexus." *Id.* at 30a. The court distinguished Section 924(g) on the ground that transfer of firearms may be "deemed more related to the regulation of interstate commerce than mere use or possession." Pet. App. 32a.

[31] Congress has concluded, for example, that the presence of firearms is (with very limited exceptions) simply incompatible with the proper functioning of federal government offices. See 18 U.S.C. 930 (1988 & Supp. IV 1992). Obviously Congress need not demonstrate a nexus to interstate commerce to protect the effective operation of federal facilities. But if (as we demonstrate above) the proper functioning of primary and secondary schools affects interstate and foreign commerce, then Congress may act to protect the schools just as it has acted to protect the facilities of the federal government.

As we have argued above, see pages 17-18, *supra*, we believe that violent crime *in general* imposes sufficient burdens on interstate commerce to permit Congress very broad latitude to enact measures rationally designed to reduce its incidence. But whatever constitutional limits there may be on Congress's power to combat violent crime generally, Congress had ample basis to regard the effective functioning of our country's schools as a matter of particular concern to the national economy. The Gun-Free School Zones Act is best viewed as standing at the intersection of two lines of extensive legislation. Congress has repeatedly noted the impact of primary and secondary education upon national productivity and competitiveness, and it has repeatedly legislated upon the premise that such a nexus exists. Congress has also acted frequently to restrict the transfer and possession of firearms in order to prevent the impairment of national interests. The evidence adduced and findings made in the course of those prior legislative proceedings make clear that the Gun-Free School Zones Act is a permissible exercise of Congress's power under the Commerce Clause, as well as a law "necessary and proper for carrying into Execution" that power.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ JR.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JULY 18, 1994

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QUESTIONS PRESENTED

1. Whether Congress can extend its Commerce Clause power to prohibit possession of any firearm within 1000 feet of school grounds, without providing a statutory nexus to interstate commerce or finding that the proscribed possession affected commerce.

2. Whether 18 U.S.C. § 922(q)(1) exceeds the commerce power because Congress neither regulated conduct that substantially affects interstate commerce nor reasonably adapted its proscription to its intended purposes.

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 2 F.3d 1342. The order of the district court (Pet. App. 55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1993. The court of appeals denied a petition for rehearing on November 10, 1993. Pet. App. 56a-57a. The petition for a writ of certiorari was filed on February 2, 1994, and granted on April 18, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Necessary and Proper Clause of the Constitution, Article I, Section 8, Clause 18, provides: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

3. The provisions of 18 U.S.C. §§ 921(a)(25), 921(a)(26), and 922(q) are set out in Appendix A to this brief, *infra* p. 1a.

STATEMENT

1. Respondent Alfonso Lopez Jr. was a twelfth-grade student at Edison High School in San Antonio, Texas. On March 10, 1992, school officials received an anonymous tip that Lopez was carrying a gun in school, and summoned him to the principal's office. When Lopez reported, he was questioned by a school policeman and immediately admitted having a gun. Officials found an unloaded .38-caliber revolved in Lopez's waistband and five cartridges in his trouser pocket. Lopez was arrested. When interviewed by a San Antonio police officer, Lopez explained that he had received the revolver from another person to hold during the school day for delivery to a third person after school.[1]

Later that afternoon, an agent of the federal Bureau of Alcohol, Tobacco and Firearms (BATF) arrived at the school to interview Lopez. Lopez again admitted he possessed the weapon; according to the agent, Lopez said the gun was to be delivered for use in a gang war. He was then transported by San Antonio police to the county jail and charged under state law with firearm possession on school premises. R. 213; Presentence Report (P.R.) para. 20, at 5. In Texas, that offense is a third-degree felony. TEX. REV. PENAL CODE ANN. § 46.04(c) (West Supp. 1994).

2. The day after Lopez's state arrest, federal agents charged him by complaint with a violation of the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A). R. 212. Because federal prosecution was initiated, the state charge was dismissed. P.R. para. 20, at 5.

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[1] Petitioner's statement that "Lopez arrived at school in possession of a concealed .38 caliber handgun," Pet. Br. 7, although taken directly from the court of appeals' opinion, Pet. App. 2a, is incorrect. The record is devoid of evidence as to when or where Lopez received the handgun.

A federal grand jury indicted Lopez on one count of knowing possession of a firearm at a school zone, in violation of § 922(q)(1)(A). R. 203. Lopez moved to dismiss the indictment, asserting § 922(q)(1)(A) was unconstitutional because it sought to legislate control over the Texas public schools and exceeded Congress's enumerated powers. R. 200-01, 198-199A. That motion was denied. R. 79.

3. Lopez waived his right to a jury and proceeded to trial before a district judge in order to preserve his constitutional defense. R. 68; Tr. 8. The district court found Lopez guilty and ordered a presentence report. Tr. 10. The report revealed that Lopez had no prior record, either as a juvenile or adult. P.R. paras. 21, 22, at 5. Lopez told the probation officer that he had been asked to hold the gun for others because he was a good student and rarely incurred disciplinary problems. P.R. para. 8, at 4. School records later submitted to the court showed that Lopez had no disciplinary problems. R. 40-46. Although Lopez was expelled from high school as a result of this incident, he was allowed to continue his education at an alternative education center and received his diploma on June 6, 1992. P.R. para. 36, at 8.

The presentence report also showed that in August 1991, before his senior year in high school, Lopez had enlisted in the U.S. Marine Corps. P.R. para. 27, at 7. At the sentencing hearing, Lopez's Marine recruiter testified that Lopez had enlisted in the Corps' delayed-entry program, passed the physical and preliminary requirements, and was to report to boot camp before August 1, 1992. Tr. 15-16. The recruiter said Lopez would make a good Marine, and if Lopez did not "have an opportunity to go to basic training, I think it's going to be the Marines Corps' loss, I really do." Tr. 21-22. Sentence was imposed under the federal sentencing guidelines: 6 months' imprisonment, 2 years' supervised release, and a $50 special assessment.

4. On appeal, Lopez renewed his argument that § 922 (q)(1)(A) was unconstitutional.[2] The Fifth Circuit Court of Appeals reversed Lopez's conviction. Recognizing that the "question is essentially a jurisdictional one," Pet. App. 45a, the court extensively reviewed prior federal firearms legislation, examining both its relation to commerce and any findings upon which it was based. Finding the Act to be "a singular incursion by the Federal Government into territory long occupied by the States," *id.*, and noting the total absence of a commerce nexus or supportive findings, the court found that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." Pet. App. 53a. The court refused to speculate whether "with adequate Congressional findings or legislative history, national legislation of a similar scope could be sustained." It left open the question whether "a conviction under section 922(q) might be sustained if the government had alleged and proved that the offense had a nexus to commerce." *Id.* Because no such nexus had been alleged in the indictment charging Lopez, the court of appeals reversed the conviction. *Id.*

5. The Government suggested rehearing en banc. That suggestion, also treated by the court of appeals as a petition for panel rehearing, was denied. Pet. App. 56a. The court of appeals issued its mandate, and the district court dismissed the indictment. R. 217.

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[2] Lopez also appealed the length of his supervised release and the amount of his special assessment. He contended that punishments of their magnitude were authorized only upon conviction of a felony, while the Act's sentencing provisions specifically state that "a violation of section 922(q) shall be deemed a misdemeanor." 18 U.S.C. § 924(a)(4). Because the court of appeals found § 922 (q)(1)(A) unconstitutional, it never reached the sentencing issues. Pet. App. 54a n.54.

SUMMARY OF ARGUMENT

The Gun-Free School Zones Act (the Act) purports to extend federal firearm laws to reach possession of any firearm in or near a school. This intrudes into two areas traditionally regulated by the states: criminal law and education. Petitioner argues that this intrusion was a proper exercise of Congress's power under the Commerce Clause.

Petitioner is incorrect for two reasons. First, Congress failed to link the activity it regulated to commerce, either by including an express commerce nexus or making the necessary supporting findings. Second, Congress enacted a law that neither regulates activities substantially affecting commerce nor reasonably adapts its proscription to its intended goal.

1. Section 922(q) contains no link to interstate commerce. The object of its regulation, firearms possession, is not a commercial activity, and the statute contains no nexus to commerce as an element of the offense. The Act attempts instead to regulate a broad class of activity without a congressional finding that the activity exerts any effect on interstate commerce that would bring it within the scope of federal regulation.

Petitioner contends that congressional findings may be inferred solely from Congress's passage of the Act. This contention is erroneous. The Court has upheld much federal regulation on the ground that the class of activity regulated affects interstate commerce; however, the Court has always depended on Congress to first declare the activity's effect and delineate clearly the extent of regulation.

The Act is bereft of any such findings or declarations. It is silent as to the effect that simple firearm possession near a school exerts upon interstate commerce, and it also fails to indicate the extent to which Congress desired to exercise its Commerce Clause power. This Court has never held such findings to be implicit in the enactment of legislation, and it should reject petitioner's invitation

to do so here. When, as here, legislation intrudes upon traditional state prerogatives, explicit findings are essential to demonstrate its validity.

This Court has consistently required Congress to indicate clearly and explicitly its intention to alter the balance between state and federal power, whether by way of its commerce or other enumerated powers. Requiring Congress to find that an activity affects commerce before regulating it performs vital functions necessary to the exercise of the commerce power.

First, findings serve to ensure that Congress has clearly stated the extent to which it wishes to exercise federal jurisdiction under the Commerce Clause. As this Court has recognized, Congress does not always intend to reach the full extent of its commerce power. Those powers reach farthest when they regulate activities substantially affecting interstate commerce, and a finding to that effect shows Congress's intent. The Act's lack of such a finding, and lack of any nexus to commerce in its text, leaves this Court no basis to determine the extent of the jurisdiction Congress intended to invoke. Because courts cannot assume that Congress always, or ever, wishes to exert its full jurisdiction, the Act lacks an enforceable jurisdictional basis.

Second, findings serve to safeguard federalism and maintain the constitutional scheme of separation of powers. Federalism, the division of powers between the states and the national government, is the overarching principle embodied throughout the Constitution. Findings safeguard federalism by ensuring that, before Congress exercises its powers under the Commerce Clause, it has addressed the issues of federalism such exercise may raise. Findings preserve separation of powers by obviating the temptation to substitute judicially inferred findings for congressional statements.

Both federalism and separation of powers are means to a greater end—liberty. The Constitution seeks to protect

liberty by diffusing power, both between the state and federal governments and among the branches of the federal government. Requiring Congress to make findings furthers this objective by setting forth procedural requirements that must be met before these balances are disturbed.

In some cases, when Congress is simply expanding coverage in an area where it has previously established federal jurisdiction, earlier findings may be called upon to support subsequent legislation. That is not the situation here. The Act represents a new and radical departure from previous federal firearms legislation. As the court of appeals discussed extensively, the Act differs greatly from prior federal firearms legislation, both in the scope of its coverage and the extent of jurisdiction asserted. Moreover, the Act interferes with law-abiding citizens' possession of firearms, an intention that Congress emphatically disclaimed in earlier legislation.

Similarly, petitioner cannot extract from this Court's past decisions excusing the absence of findings from particular legislation a general principle that findings are never necessary. In the few cases in which this Court has excused the absence of findings, it has always had ample indicia of a commerce nexus—by means of statutory definitions, legislative history, or previous regulation of the activity in question—upon which to rely. This Court's consistent, subsequent, references to findings as the way Congress invokes its Commerce Clause jurisdiction dispels the notion that they are never required.

2. Even if this Court decides that findings are unnecessary to support the Act's two-fold intrusion into the states' domains, the Act cannot withstand constitutional scrutiny. None of petitioner's proffered connections to commerce supports the broad intrusions made by the Act. Petitioner's attempts to link the Act to commerce are so attenuated as to constitute little more than an argument for a general police power that the federal govern-

ment does not have. Simply put, petitioner has not shown that mere possession of a firearm within 1000 feet of a school has any substantial effect on interstate commerce. Nor has petitioner demonstrated how such a broad proscription is necessary to effectuate any narrower regulatory goal that might be linked to interstate commerce.

Although Congress's goal of reducing school gun violence is laudable, its means are not reasonably adapted to the goal. The Act's broad proscription of simple possession of any firearm is unnecessary because the Act separately proscribes discharge of a firearm in a school zone. If a ban on discharge did not sufficiently protect against school gun violence, Congress could still achieve its purpose less intrusively by proscribing possession with specified intents. Absent a showing that mere possession somehow increases the likelihood that a firearm will be misused, the Act's prohibition on that possession is overinclusive and bears no rational relationship to the goal of reducing gun violence in and around schools.

The Act's ability to attain its goals is further undermined by some of its provisions. The Act did not amend federal juvenile delinquency laws, which effectively shield the great majority of potential offenders from prosecution in federal court. The Act's sweeping exemption for firearm possession on private property reopens large areas within school zones to gun possession regardless of the possessor's intent or proximity to a school, or the threat that may be posed to children.

In sum, the Act's attenuated relation, if any, to interstate commerce, and its overinclusive proscriptions and underinclusive coverage, demonstrate that it bears no rational relationship to the regulation of interstate commerce and is not reasonably adapted to any end permitted by the Constitution. Because the Act represents a well-intentioned but constitutionally impermissible attempt to establish a general police power, a conviction under it cannot stand.

ARGUMENT

Through the Gun-Free School Zones Act, Congress purported to extend direct federal regulation to schools and to areas within 1000 feet of a school ("school zones"). The regulation enacted prohibits simple possession of a firearm, with a few exceptions not at issue here, at a school zone, and prescribes a criminal penalty including up to 5 years' imprisonment. 18 U.S.C. §§ 922 (q)(1), 924(a)(4). In so doing, Congress has intruded on two areas of traditional state primacy: criminal law and education.

Because the federal government does not have a general police power, the Act can be sustained only by tying it to one of Congress's powers enumerated in the Constitution. Petitioner suggests the Commerce Clause provides such mooring. Petitioner's argument cannot succeed because, in passing the Act, Congress neither properly invoked commerce power nor properly exercised it.

To properly invoke its commerce power, Congress must either regulate interstate commerce directly or find that the activity to be regulated substantially affects interstate commerce. To exercise its commerce power properly, Congress must legislate rationally and must reasonably adapt its measures to the regulation or protection of commerce. In passing the Act, Congress has done neither.

I. IN ENACTING THE GUN-FREE SCHOOL ZONES ACT, CONGRESS FAILED TO MAKE THE FINDINGS NECESSARY TO PROPERLY EXERCISE ITS COMMERCE POWER.

Congress "can exercise only the powers granted to it" by the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. (17 U.S.) 316, 405 (1819). In passing 18 U.S.C. § 922 (q)(1) as part of the Gun-Free School Zones Act ("the Act"), Pub. L. No. 101-647, § 1702(b)(1), 104 Stat.

4789, 4844 (1990), Congress made no effort to substantiate its action as a valid exercise of its Commerce Clause power.[3] Congress did not explicitly limit § 922 (q)(1)'s application to firearm possession "in or affecting commerce." It did not make any findings that firearm possession within 1000 feet of a school substantially affects interstate commerce, and petitioner concedes that the legislative history lacks any direct discussion of "the effects upon interstate commerce of firearms possession on or near school property." Pet. Br. 5.[4]

Petitioner asserts that none of these actions was necessary and that "the congressional 'finding' can very properly be—and often is—merely implicit in the enactment itself." Pet. Br. 17 n.8. Petitioner makes this argument without citing any case in which this Court has upheld a statute's constitutionality on the theory that findings were implicit in the statute itself.

Petitioner confuses the invocation of federal jurisdiction with the implementation of federal power. It thereby invites this Court to apply the deferential standard of review appropriate to the exercise of plenary federal powers without first undertaking the jurisdictional review applicable to a government of limited and enumerated powers. The power to regulate commerce may be plenary, but the

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[3] Congress never identified the Commerce Clause as the source of its power to pass the Act, nor was it required to do so. *See Woods* v. *Miller Co.*, 333 U.S. 138, 144 (1948). Petitioner has never suggested to the courts below or to this Court that the Act is a proper exercise of some other enumerated power.

[4] The only testimony received during the House hearing that even remotely touched on interstate commerce was the Cleveland, Ohio, police chief's complaint that gangs from other parts of the country were supplying local gangs with weapsons. *Gun-Free School Zones Act of 1990: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary* ("*House Hearing*"), 101st Cong., 2d Sess. 72 (testimony of Edward P. Kovacic). How this might indicate that gun possession within 1000 feet of a schoolyard affects interstate commerce is not apparent.

reach of that power is circumscribed by the Constitution and by the nature of our federal system embodied in it. The Commerce Clause is neither self-executing nor an affirmative command that Congress shall regulate. As an enumerated power, it permits Congress to regulate, but only to the extent authorized. The court of appeals properly held, Pet. App. 53a, that because Congress had not limited the Act to firearm possession in or affecting commerce and failed to make its own finding that such activity substantially affected commerce, respondent's conviction under the Act could not stand.

"[U]nlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). Congressional jurisdiction under the Commerce Clause reaches, in the main, three categories: (1) the use of channels of interstate or foreign commerce; (2) protection of the instrumentalities of interstate commerce; and (3) those activities affecting interstate commerce. *Perez* v. *United States*, 402 U.S. 146, 150 (1971).

Without dispute, this case involves only the third *Perez* category. Pursuant to this power, Congress may regulate intrastate actvities, but only "if they have such a *close and substantial* relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (emphasis added); see also *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) (activity must exert "substantial economic effect on interstate commerce"). Although Congress must exercise its judgment in determining whether certain conduct substantially affects interstate commerce,

it remains this Court's duty "to determin[e] whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised." *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944).

A. The Lack of a Commerce Nexus or Findings Renders § 922(q)(1) Constitutionally Suspect.

Any law enacted under the Commerce Clause must involve commerce; accordingly, Congress must demonstrate a substantial link between the object of its regulation and interstate commerce. The Court will consider all possible sources of information, including the statute's text and congressional findings, both formal and informal, to discern congressional judgments and to determine the sufficiency of the link to commerce. Here, however, Congress failed to provide any nexus between interstate commerce and possession of a firearm within 1000 feet of a school, let alone a substantial one.

Congress's first opportunity to link firearm possession near a school to interstate commerce arose when it drafted § 922(q)(1). Congress, however, did not mention interstate commerce in the statute. Section 922(q)(1) prohibits, with certain exceptions, the knowing possession of any firearm within 1000 feet of a place that the individual knows or should know is a school zone. 18 U.S.C. §§ 922(q)(1)(A), 921(a)(25)-(26). As written, § 922(q)(1) stands virtually alone among the proscriptions of Chapter 44 of Title 18 (entitled "Firearms") by omtting a facial nexus to interstate commerce. See Pet. App. 50a. In addition, § 922(q)(1) represents the first time that Congress has attempted generally to ban the simple possession of all firearms under its commerce power.[5] Unlike

[5] By contrast, Congress's ban on firearm possession in federal facilities, 18 U.S.C. § 930, is grounded in the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, which this Court has recognized "invests unlimited power in Congress." *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987). Thus § 930 need not have any commerce nexus.

importing, manufacturing, transporting, selling, or acquiring a firearm (conduct that is proscribed by other subsections of 18 U.S.C. § 922), merely possessing a firearm has no obvious commerce nexus.[6] See *United States* v. *Five Gambling Devices*, 346 U.S. 441, 446 (1953) (noting serious constitutional questions raised by statute that required persons to register their intrastate possession of gambling equipment).

Congress knows how to draft a statute that reaches the full extent of its commerce power. When Congress "wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce,' but also matters which 'affect' . . . interstate commerce." *Polish Nat'l Alliance*, 322 U.S. 647. See also *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (by drafting NLRA to cover all unfair labor practices affecting commerce, "Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause") (emphasis in original); *United States* v. *American Bldg. Maint. Indus.*, 422 U.S. 271, 279-80 (1975) ("in commerce" and "affecting commerce" are distinct terms of art).

Indeed, Congress has used this latter term of art in previous firearms legislation. Former 18 U.S.C. App. § 1202(a)(1) made it a crime for any specified person to "receive[], possess[], or transport[] in commerce or af-

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[6] Although petitioner acknowledges that the Fifth Circuit distinguished § 922(q) from every other firearms offense, Pet. Br. 43 & n.30, it does not contest that court's careful analysis. Petitioner would minimize § 922(q)'s unusual status by pointing out that 18 U.S.C. § 922(o), which bans the possession of machineguns manufactured since 1986, also lacks a facial nexus to interstate commerce. Pet. Br. 41. It is unclear how this fact helps petitioner. Section 922(o) was passed in separate legislation, with a separate legislative history, and has separate legislative antecedents. Its constitutionality is not on review here.

fecting commerce . . . any firearm."[7] In *Scarborough* v. *United States*, 431 U.S. 563 (1977), the Court characterized Congress's deliberate use of the term "affecting commerce" in § 1202(a)(1) as a "means to insure [its] constitutionality." *Id.* at 575 & n.11. After Congress carefully included a commerce nexus in § 1202(a) to preserve that statute's constitutionality, its omission of this language from the Act reinforces what is apparent: § 922 (q)(1) lacks an adequate nexus to interstate commerce.

Congress's omission of any nexus element from § 922 (q) cannot be considered a mere oversight. During the House hearing on the bill, a representative of the Bureau of Alcohol, Tobacco, and Firearms (BATF), the agency charged with enforcing all federal firearms regulations, expressly noted the bill's lack of a stated nexus to interstate commerce:

> [T]he source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against possession of firearms by felons, mental incompetents and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, *and the unlawful acts specifically included a commerce element.*

House Hearing at 10 (statement of Richard Cook) (emphasis added).[8] Despite this pointed warning, Congress did not cure the defect.

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[7] The substance of former 18 U.S.C. App. § 1202(a)(1) now appears at 18 U.S.C. § 922(g).

[8] Upon signing the Crime Control Act of 1990, President Bush voiced his reservations concerning the federalism issues that the Gun-Free School Zones Act raised: "Most egregiously, section 1702 inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the states, but they should not be imposed upon the States by the Congress." Statement of President George Bush upon signing S. 3266, 26 Weekly Comp. Pres. Doc. 1944 (Dec. 3, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6696-1.

As this Court and Congress have previously recognized, the lack of a commerce nexus renders a statute regulating local, non-commercial activity immediately suspect. See *United States* v. *Bass*, 404 U.S. 336, 347, 350 (1971) (interpreting § 1202(a) as requiring interstate commerce nexus for the firearm possession offense); *Scarborough*, 431 U.S. at 575 (noting that "there was some concern" in Congress about the constitutionality of statute proscribing mere possession). Focusing instead on whether findings are necessary, petitioner ignores this Court's emphasis in *Bass* and *Scarborough* on the need for a commerce nexus, a nexus that § 922(q) lacks. Without this nexus, the Act enters the second phase of analysis in a suspect constitutional position.[9]

Having failed to include any commerce nexus in the text of § 922(q)(1), Congress could still have demonstrated a nexus through formal findings elsewhere in the Act, see *Perez*, 402 U.S. at 147 & n.1, 155, or through informal findings by means of substantial evidence in the Act's legislative history. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53 (1964). Congress did neither. It did not issue any reports or receive any testimony that demonstrate a substantial nexus between possession of a firearm near a school and interstate commerce.

Petitioner, untroubled by the absent nexus, attempts to extract from a few of this Court's decisions involving dif-

[9] To preserve the statute's constitutionality, *see Jones & Laughlin*, 301 U.S. at 30, the Court might read in a nexus element so that § 922(q)(1) would proscribe only the possession of a firearm "affecting commerce" in a school zone. Such a modification, however, would not aid petitioner here. First, as will be shown in the rest of this Part and in Part II, modifying § 922(q)(1) by adding the term "affecting commerce," without more, would not necessarily save its constitutionality. Second, as the court below held, such a construction could not preserve respondent's conviction because he was not indicted for possessing a firearm "affecting commerce," see Pet. App. 53a, and petitioner has not challenged this portion of the Fifth Circuit's decision.

ferent legislation an overarching principle that congressional findings are never necessary to justify the exercise of one of Congress's enumerated powers. Pet. Br. 14-16. In so arguing, petitioner misconstrues this Court's substantial body of Commerce Clause cases and overlooks the critical functions that findings serve.

B. Findings Perform Functions Critical to the Constitutional Exercise of Commerce Power.

Findings are important to the constitutional exercise of the Commerce Clause power. They are needed to discern Congress's intent and the scope of the legislation under review. They also ensure that in exercising its commerce power, Congress acts in consonance with the principles of federalism and separation of powers, which are essential elements of a Constitution drawn both to promote general welfare and to protect liberty for all.

The importance of congressional findings, or the lack thereof, in determining the jurisdictional basis of federal legislation is illustrated in *Hill v. Wallace*, 259 U.S. 44 (1922). In *Hill*, this Court struck down the Future Trading Act, through which Congress sought to regulate grain futures contracts by means of a tax. The Court found such regulation to be a subterfuge for exercising a general police power; it further found that the act was an improper exercise of the commerce power. The Court found no indication in the act that Congress's efforts were directed toward interstate commerce. 259 U.S. at 68. Because the contracts were "not in and of themselves interstate commerce," the Court found them to be beyond the regulatory power of Congress "unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon." *Id.* at 69.[10]

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[10] Although the Court has questioned the continuing validity of *Hill*'s holding as to regulation by taxation, see *Bob Jones University v. Simon*, 416 U.S. 725, 741 n.12 (1974), it has not questioned its refusal to uphold that act under the Commerce Clause.

Notably, when Congress made such findings a year later in the Grain Futures Act, the Court found that act constitutional under the Commerce Clause. See *Board of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 42 (1923). Under *Hill*, the lack of findings to support the Gun-Free School Zones Act renders it invalid.[11] As shown below, *Hill*'s holding is rooted in sound pragmatic and constitutional reasoning.

1. *Findings are necessary to discern the intent of Congress.*

Attempting to avoid application of clear-statement requirements, Petitioner asserts that "it is undisputed that Congress intended to proscribe the conduct for which respondent was convicted." Pet. Br. 30-31. Petitioner again confuses the implementation of federal power with the invocation of federal jurisdiction.[12] Clear-statement requirements do apply because there is indeed ambiguity in the Gun-Free School Zones Act. It is ambiguous be-

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[11] An amendment to 18 U.S.C. § 922(q) that would add extensive findings has been referred to conference committee as part of the Violent Crime Control and Law Enforcement Act of 1993. See H.R. 3355, § 2972, 103d Cong., 1st Sess., *quoted in* Pet. Br. 6 n.2; 140 Cong. Rec. H422-01 (daily ed. Apr. 21, 1994). Of course, as petitioner concedes, Pet. App. 6 n.4, such legislation will not affect the validity of prosecutions under the existing statute.

[12] Petitioner cites *EEOC v. Wyoming*, 460 U.S. 226, 240 n.18 (1983), for the proposition that " '[R]ules of statutory construction [used] . . . to divine the meaning of otherwise ambiguous statutory intent . . . simply have no relevance to the question of whether' Congress has legitimately exercised its powers under the Commerce Clause." Pet. Br. 31. Contrary to petitioner's characterization, the footnote in *EEOC* v. *Wyoming* has nothing to do with the Commerce Clause. It addresses Fourteenth Amendment considerations, and expressly distinguishes the Commerce Clause constraints present here. See 460 U.S. at 244 n.18 ("We do reaffirm that when properly exercising its power under § 5 [of the Fourteenth Amendment], Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers.").

cause it does not indicate the extent of jurisdiction Congress wished to exercise, and because it does not indicate whether Congress intended a case-by-case determination of the activity's connection with interstate commerce.

Congress may indicate the extent of a statute's reach under the commerce power in a number of ways. It may include a jurisdictional term in the text of the statute. In such cases, the language Congress uses to invoke its commerce power determines the extent to which it has chosen to exercise its jurisdiction. This Court has recognized that Congress is aware of the distinction between legislating only in activiites "in commerce" and activities "in any activity affecting" commerce; the broader language shows Congress's intent to exercise its full authority under the Commerce Clause. *Russell v. United States*, 471 U.S. 858, 859 & n.4 (1985). Alternatively, Congress can indicate its intention to reach the full extent of its commerce power by expressly finding that an activity substantially affects interstate commerce. *United States* v. *Darby*, 312 U.S. 100, 120 (1941). By failing to include either a jurisdictional term in the text or a congressional finding that the class of activity affected commerce, Congress left the Act's jurisdictional coverage ambiguous.

Petitioner's assertion that no ambiguity exists assumes that the enactment alone of facially broad legislation implies that Congress sought to reach to the full extent of its jurisdiction. This view was rejected in *Kirschbaum v. Walling*, 316 U.S. 517 (1942). In *Kirschbaum*, the Court was called upon to determine the extent of coverage of the Fair Labor Standards Act (FLSA). The Court viewed this task as "marking out the extent to which Congress has exercised its constitutional power over commerce," so as to accommodate the conflict between "assertions of new federal authority and historic functions of the states." *Id.* at 520. Because Congress had varied the jurisdictional reach of its legislation many times, even in the same subject area, the Court concluded that it could not "indulge in the loose assumption that when

Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation." *Id.* at 521.

As in *Kirschbaum,* the Court must here decide, in an area of traditional state primacy, the extent to which Congress intended to exercise its jurisdiction. As with the FLSA, Congress has varied the reach of its firearms legislation.[13] In this situation, specific congressional findings are essential to determine the extent to which Congress intended to exercise its jurisdiction. Because they are lacking, the Court should conclude here, as it did in *Hill,* that Congress has not properly invoked its commerce power.

Even assuming that Congress wished to exercise the full extent of its commerce jurisdiction, the Act's lack of either a commerce nexus or a congressional finding that possession of a firearm within 1000 feet of a school affects interstate commerce creates a second, related ambiguity. Congress may have omitted making findings because it intended to include a commerce nexus, or it may have omitted a commerce nexus because it intended to make findings. As Congress was reminded by BATF officials, *supra* p. 17, the bill lacked both. Because both reach to the same jurisdictional extent, Congress might have chosen either.

While either of these options would express Congress's intent to reach the full extent of its commerce power, its

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[13] Title 18 U.S.C. § 922, "Unlawful acts," has 21 subsections, including the Gun-Free School Zones Act. The extent of federal jurisdiction asserted varies greatly among the subsections, from reaching only federally licensed individuals, see, e.g., §§ 922(b), 922(m); to reaching activities "in interstate or foreign commerce," see, e.g., §§ 922(e), 922(f), 922(i); to reaching activities "in or affecting commerce," see, e.g., §§ 922(g), 922(h); to reaching activities without any explicit nexus to commerce, see, e.g., §§ 922(o), 922(p), 922(q).

choice between them would make a significant difference in prosecutions under the Act. Including a commerce nexus in the text makes it an element of the offense to be determined by a factfinder. *Bass*, 404 U.S. at 339. Cf. *Darby*, 312 U.S. at 120 (Congress often leaves commerce determination to others). By contrast, when Congress finds that a class of activity affects commerce, or includes a class of activity in its statutory definition of affecting commerce, it precludes a case-by-case examination of that issue. See *Katzenbach* v. *McClung*, 379 U.S. 294, 303-04 (1964). By lacking both commerce nexus and findings, the Act gives no indication who must determine this critical jurisdictional factor.

The Court's task is similar to the one it faced in *Bass*. The statute considered there included both findings and a commerce element, but the government disputed whether that element applied to Bass's conduct. Because it was unclear how Congress intended to apply the nexus requirement, the Court found that statute ambiguous. 404 U.S. at 347. Invoking the rule of lenity, and avoiding any constitutional decision, this Court held that proof of the commerce nexus was required and reversed Bass's conviction for failure to prove that essential element. *Id.* at 347-50.[14]

Here the Act has neither findings nor nexus, and Lopez was not convicted for possessing a firearm "in and affecting commerce."[15] By passing the Act without either a

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[14] Applying *Bass* to this case could require the inclusion of a commerce element in all indictments under § 922(q), both to accord with federalism concerns and to comport with the rule of lenity. Such a conclusion, however, would preserve neither the statute nor Lopez's conviction. See *supra* p. 15 n.9.

[15] The court of appeals held that the lack of a commerce allegation in the indictment precluded it from considering whether Lopez's "conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce." Pet. App. 53a.

requirement that a nexus be pleaded and proved, or a finding that would obviate the need for such an element, Congress left its intent ambiguous. This Court should insist on findings to preclude the passage and enforcement of penal laws burdened by such ambiguity.

2. *Findings are necessary to preserve federalism and to maintain the separation of powers.*

When, as here, novel federal legislation intrudes on traditional state functions, it is appropriate for courts to require Congress to demonstrate the link between the regulated activity and its constitutional authority. The requirement is particularly appropriate for legislation that does not obviously fall within one of Congress's enumerated powers. This Court has previously cautioned against "indulg[ing] in the loose assumption" that, when Congress regulates part of an area, it intends to regulate all aspects of it:

> Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation.

Kirschbaum, 316 U.S. at 521. See also *Polish Nat'l Alliance*, 322 U.S. at 650 ("[i]t is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology"); *id.* at 652 (Black, J., concurring) ("this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation"); *Jones & Laughlin*, 301 U.S. at 30 (the "distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system").

Federalism concerns were paramount in *Bass*.[16] In deciding whether § 1202(a) prohibited a felon from possessing any firearm (as the government had urged), or only one affecting commerce, the Court noted that the former interpretation "would mark a major inroad into a domain traditionally left to the States." *Id.* at 339; see also *id.* at 350 (adopting government's interpretation would "dramatically intrude[] upon traditional state criminal jurisdiction"). Noting that Congress's traditional reluctance to define as a federal crime conduct "readily denounced as criminal by the States" was "rooted in . . . concepts of American federalism," the Court held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349. The Court explained that "the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Finally, the Court expressed its desire to have a clear statement from Congress before effecting "a significant change in the sensitive relation between federal and state criminal jurisdiction," *id.*, when it declined to "reach the question whether, *upon appropriate findings*, Congress can constitutionally punish the 'mere possession' of firearms." *Id.* at 339 n.4 (emphasis added).

Bass comports with this Court's numerous other decisions requiring definite expressions of congressional intent before applying statutes enacted under the Commerce Clause in a manner that intrudes on states' powers. See *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2401 (1991); *United States* v. *Enmons*, 410 U.S. 396, 411-12 (1973); *Rewis* v. *United States*, 401 U.S. 808, 811-12 (1971); *Five Gambling Devices*, 346 U.S. at 450-52; *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 354-55 (1941); *Apex*

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[16] Petitioner omits any analysis of *Bass* or *Scarborough* in its brief, despite the court of appeals' heavy reliance on *Bass*, Pet. App. 6a, and the obvious relevance of those decisions to proper analysis of this case.

Hosiery Co. v. *Leader*, 310 U.S. 469, 513 (1940). Apart from *Gregory*, these cases involved direct federal regulation of individual activity, and they refute petitioner's attempt to limit clear-statement principles to "potential incursions directly onto the operations of state governments." Pet. Br. 27. Petitioner's argument that Congress need not explain the exercise of its enumerated powers would render meaningless the clear-statement principles discussed in these cases.

Here, Congress was aware that the Act would tread on traditional and significant areas of state regulation,[17] yet it made no findings on the importance to interstate commerce of such an intrusion, as required by *Bass*.[18] Al-

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[17] Rep. William Hughes, chairman of the Subcommittee on Crime of the House Judiciary Committee, had the following colloquy with Richard Cook, chief of BATF's Firearms Division:

> Mr. Hughes: This would be a major change, would it not, in Federal jurisdiction . . . . This would, it seems to me, put us in the position of, for the first time, playing a direct role in the enforcement of a particular Federal law—a gun law—at the local level, the school district level.
>
> . . . .
>
> Mr. Cook: In this particular instance, this legislation would give us original Federal jurisdiction, which would—
>
> Mr. Hughes: That would be a major departure from basically what has been the practice of the past.
>
> Mr. Cook: As far as schools are concerned, yes, it is.
>
> Mr. Hughes: A major departure from a traditional federalism concept which basically defers to State and local units of government to enforce their laws.
>
> Mr. Cook: Yes.

House Hearing at 14.

[18] The *Bass* Court's comment on the need for a clear statement from Congress is particularly instructive because, in outlawing firearm possession by convicted felons, the Omnibus Crime Control and Safe Streets Act did contain a generalized formal finding that "the receipt, possession, or transportation of a firearm by felons . . . constitutes . . . a burden on commerce or threat affecting the free flow of commerce." Pub. L. No. 90-351, § 901, 82 Stat. 270 (1968).

though neither petitioner nor its many *amici* acknowledge it, the states have legislated extensively in the area of firearms around schools. In respondent's home state of Texas, for example, the offense for which he was originally prosecuted in state court is a third-degree felony.[19] In fact, nearly every state punishes firearm possession on school grounds as a crime.[20] That the exact provisions and penalties vary from state to state is salutary. As "social laboratories," the states react to local problems in a manner best adapted to local needs. See *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This is the "genius" of the federal system. *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 195 (1824).

The varying methods states have chosen to address the problem of guns near schools refutes petitioner's contention that "the statute supplements rather than supplants the efforts of state and local authorities." Pet. Br. 29. The Act substitutes a nationwide federal straitjacket for the states' locally tailored methods of addressing the problem, impermissibly constraining the local innovation that federalism is designed to foster. In some jurisdictions, the Act purports to grant local authorities powers that the states have expressly forbidden them.[21] In others, the Act

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[19] In Texas, firearm possession on a school campus has been a crime since 1871, and a felony since 1983. See Act of Apr. 12, 1871, 12th Leg. R.S., 1871 Tex. Gen. Laws (current version at TEX. PEN. CODE ANN. art. 46.04(a)(1) (West Supp. 1994)).

[20] A compendium of the various state laws regulating firearms in and around schools is set out in Appendix B, *infra* p. 3a. Forty-two states have enacted criminal penalties for this conduct. States also address this conduct by requiring expulsion or suspension of a student who possesses a firearm on campus; by prohibiting firearm possession by a minor; or by proscribing delivery of a firearm to a minor.

[21] Several states have, in differing degrees, moved to preempt local governments from the regulation of firearms. Those states are set out in Appendix B. The extent of that preemption is, of course, a matter of state law. Nonetheless, several provisions of the Act purport to empower school officials to exempt individuals

denounces as a federal offense conduct that the states have chosen to allow.[22]

The federalism concerns implicated by § 922(q)(1) do not end with Congress's intrusion into state criminal law, as they did in *Bass*; they apply with even greater force here because Congress is regulating schools. Education is one of every state's core constitutional functions.[23] Congress itself has recognized the primacy of the states' role in education.[24] Even as the federal role in education has grown, federal statutes concerning education invoke Congress's spending or Fourteenth Amendment power rather than its commerce power.[25]

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from its coverage. *See* 18 U.S.C. § 922(q)(1)(B)(iv) ("program approved by a school"); § 922(q)(1)(B)(v) (contract with a school); § 922(q)(1)(B)(vii) (traversing school premises for hunting if "authorized by school authorities").

[22] The most notable example is the Act's expansion of the geographical area to which the prohibition applies. The geographical reach of state laws proscribing firearm possession in or near schools ranges from the school itself to 2 miles from the school. *Compare* MO. ANN. STAT. § 571.030(8) (Vernon 1993) (carrying firearm into school) *with* MISS. CODE ANN. § 97-37-17 (1993) (2 miles); see *infra* Appendix B.

[23] A compendium of the 50-state constitutional provisions regarding public education is set out in Appendix C, *infra* p. 11a.

[24] See Department of Education Organization Act, Pub. L. No. 96-88, §§ 101(4), 103(a), 93 Stat. 668, 669-70 (1979) (codified at 20 U.S.C. § 3401(4)) ("the primary public responsibility for education is reserved respectively to the States and the local school systems"); § 3403(a) ("[t]he establishment of the Department of Education shall not increase the authority of the Federal Government over education").

[25] *See, e.g.*, 20 U.S.C. § 3402 ("Congress declares that the establishment of a Department of Education is in the public interest, [and] will promote the general welfare"); 20 U.S.C. § 2701(a) ("Congress declares it to be the policy of the United States to—(A) provide financial assistance to State and local educational agencies to meet the special needs of such educationally deprived children at the preschool, elementary, and secondary levels"). Petitioner's argument to the lower courts that Congress's spending

Thus, contrary to petitioner's assertion, Pet. Br. 44, the intersection of crime and education, two areas of traditional state regulation, heightens Congress's duty to make clear the Act's relation to its commerce power. This Court has required that "when the federal government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit . . . ." *Kirschbaum*, 316 U.S. at 522; see also Pet. App. 45a. Petitioner has cited no case in which this Court has upheld the constitutionality of a statute that regulates inherently non-commercial activity on the theory that congressional findings were "implicit" in the statute.

Requiring congressional findings also preserves the separation of powers. Regulation of interstate commerce is a power delegated to Congress, not to the federal government generally. Deciding what activities substantially affect interstate commerce is a responsibility entrusted to Congress. See *Stafford v. Wallace*, 258 U.S. 495, 521 (1922) ("it is primarily for Congress to consider and decide the fact of the danger and meet it"). Deciding whether those choices meet constitutional standards is a separate responsibility entrusted to this Court. *Polish Nat'l Alliance*, 322 U.S. at 650.

Conceding that the Act lacks any congressional findings or legislative history supporting the exercise of Commerce Clause authority, petitioner invites the Court to supply its own. This Court should reject the invitation. In the words of now-Chief Justice Rehnquist, "*Congress* must show that the activity it seeks to regulate has a substantial effect on interstate commerce." *Virginia Surface Mining*, 452 U.S. a 313 (Rehnquist, J., concurring) (emphasis added). The reasons for this are evident.

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powers could also be used to justify the Gun-Free School Zones Act was rejected by the court of appeals, Pet. App. 51a n.50, and has been abandoned here.

The existence of a substantial effect on interstate commerce is a jurisdictional requirement, and the declaration that an activity has a substantial effect on interstate commerce is an invocation of jurisdiction. To infer such an invocation from the enactment of legislation alone assumes that Congress intended to exercise its jurisdiction to the full extent of its constitutional authority. As set out earlier, courts cannot indulge such a "loose assumption." *Kirschbaum*, 316 U.S. at 521.

This Court has no duty to create judicially inferred findings. To do so would intrude into the legislators' realm by substituting its judgment both as to whether the activity substantially affected commerce and the extent to which Congress chose to extend its authority. That these are two separate, but related, congressional judgments is demonstrated in *Bass*'s determination that former § 1202(a) did not reach all firearms possessions by convicted felons even though the statute contained a finding that could have supported such a proscription. 404 U.S. at 345 n.14.

When Congress intrudes into an area of traditional state regulation, without finding that the regulated activity substantially affects interstate commerce, it encourages litigants to supply their own findings whenever they can postulate that the activity bears some relationship to commerce. Countless activities affect commerce in some way; only Congress can determine if that relationship is substantial. As this Court has noted, "[s]cholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." *Polish Nat'l Alliance*, 322 U.S. at 650.

Neither *post hoc* arguments of lawyers nor even opinions of judges can substitute for the congressional consideration that supports its invocation of federal jurisdiction. Litigants are not legislators, and both the object

and the reach of a statute are legislative choices. Unlike Congress, in which elected representatives make their determinations after public hearings and knowledgeable testimony, courts would be required to "guess" as to such determinations in an "informational void." See Pet. App. 44a n.44. Like any other form of judicial legislation, substitution of judicially-inferred findings for missing congressional choices undermines the separation of powers embodied in the Constitution.

3. Findings serve to preserve liberty.

Maintaining federalism and separation of powers is more than ritual fealty to the structures of a government devised in 1787. By diffusing governmental power, these structures protect liberty. Explicating the values of federalism, this Court has observed that "[i]n the tension between federal and state power lies the promise of liberty." *Gregory*, 111 S. Ct. at 2399-400. A similar protection flows from the separation of powers within the federal government: "checks and balances were the foundation of a government that would protect liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986). By dividing powers among the distinct state and federal governments, and among separate branches within each government, the framers intended to provide "double security . . . to the rights of the people." *The Federalist* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

Findings serve the ends of liberty by ensuring that legislation which might upset these carefully balanced structures is enacted only after due consideration. That this protection is procedural rather than substantive in no way diminishes its importance: "The history of American freedom is, in no small part, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J.). The Fifth Circuit thus correctly drew support from clear-statement principles adopted by this Court to protect the values of federalism. Those rules

have been applied in different contexts, but their purpose remains the same: to preserve federalism. The courts require explicit findings of a substantial effect on interstate commerce for the same reason that they require clear statements of congressional intent to otherwise impose on state prerogatives: "to assure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Gregory*, 111 S. Ct. at 2401 (quoting *Bass*, 404 U.S. at 349).

Congress passed the Gun-Free School Zones Act without any indication that it had faced, let alone resolved, issues of federal jurisdiction and the Act's scope. Congress omitted jurisdictional findings even though it was pointedly reminded of the need to make them. See *supra* p. 14. As in *Bass*, Congress has not stated its purpose clearly enough here to be deemed to have significantly altered the federal-state balance. See 404 U.S. at 349. By attempting to enlarge federal power without explanation, Congress "effectually obliterate[s] the distinction between what is national and what is local," *Jones & Laughlin*, 301 U.S. at 37, impermissibly centralizes governmental power, and diminishes the protections of liberty embodied in the Constitution.

C. Previous Congressional Findings Regarding Firearms Cannot Supply a Jurisdictional Basis for the Act.

Petitioner attempts to diminish the significance of Congress's failure to find that possession of a firearm within 1000 feet of a school substantially affects interstate commerce by rehearsing the history of federal firearms legislation. Pet. Br. 40-44. However, as demonstrated by the Fifth Circuit, Pet. App. 9a-36a, Congress's previous findings do not provide the missing link between the Act and interstate commerce. In fact, many of Congress's previous findings refute such a link. Congress's previous firearms legislation, with its limited, specific invocations of

federal jurisdiction, provides no pre-existing basis for this Act's sweeping regulation.

Congress first essayed firearms regulation in 1934 by enacting the National Firearms Act, a tax measure. 48 Stat. 1236-40 (codified as amended, 26 U.S.C. §§ 5801-5872).[26] In 1968, Congress entered into direct firearms regulation with the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, and the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Subsequent acts have further expanded firearms regulation.[27]

In enacting these earlier gun-control laws, Congress made explicit, on-the-record findings that the proscribed activities affected interstate commerce. Like the statutes themselves, these findings dealt primarily with the use and trafficking of firearms.[28] Congress's findings regarding possession of firearms have dealt either with possession by specific classes of persons,[29] or possession of specific types of firearms.[30]

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[26] At that time, even the Attorney General questioned Congress's jurisdiction to ban firearms. *See National Firearms Act: Hearings Before the House Committee on Ways and Means*, 73d Cong., 2d Sess. 19 (1934) (testimony of Attorney General Homer S. Cummings).

[27] See, e.g., Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); Crime Control Act of 1990, Pub. L. No. 101-647, §§ 1702, 2201-2205, 104 Stat. 4789, 4844, 4856-58.

[28] See, e.g., Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(1) (trafficking affects interstate commerce), § 901(a)(2) (use affects interstate commerce), 82 Stat. 197, 225.

[29] See, e.g., Gun Control Act of 1968, Pub. L. No. 90-618, § 102 (possession by persons now listed in 18 U.S.C. § 922(g)), 82 Stat. 1213, 1220.

[30] See, e.g., Pub. L. 90-351, § 901(a)(7) ("castoff surplus military weapons"), § 901(a)(8) ("highly destructive weapons"), 82 Stat. 197, 226.

These findings, limited to specified instances, do not support petitioner's sweeping assertion, Pet. Br. 11, that "[t]he evidence adduced and findings made in the course of those prior legislative proceedings make clear that the [Act] is a permissible exercise of Congress's commerce power." *Cf. Bass*, 404 U.S. at 339 n.4 (open question "whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession of firearms' "). Of course, Congress itself has never made the broad assertions that petitioner makes here, and Congress's other earlier findings contradict petitioner's contention that they support a ban on the mere possession of firearms. In its statement of legislative purpose in the Gun Control Act of 1968, Congress explicitly disclaimed any intention to "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, *possession*, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other law-abiding activity." Pub. L. No. 90-618, § 101, 82 Stat. 1213 (emphasis added). Congress included an identical proviso in Title VI of the Omnibus Crime Control and Safe Streets Act of 1968, which first outlawed possession of firearms by convicted felons and certain others. Pub. L. No. 90-351, § 101(b), 82 Stat. 197, 226. This limitation was reaffirmed by the Firearms Owners' Protection Act, Pub. No. 99-308, § 1(b)(2), 100 Stat. 449 (1986).[31] Despite these earlier congressional disclaimers, the Gun-Free School Zones Act ensnares the law-abiding citizen and the criminal alike, outlawing all unexcepted possessions within a school zone

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[31] In the Firearms Owners' Protection Act, Congress also found legislation to be required because of "the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution." Pub. L. No. 99-308, § 1(b)(1)(A), 100 Stat. 449 (1986). As ably pointed out by *amici* Academics for the Second Amendment et al., Second Amendment considerations are not insubstantial. *See also* Pet. App. 45a n.46 (Second Amendment is "something of a brooding omnipresence here").

regardless of the purpose for possessing the firearm. Such a drastic shift in approach from earlier legislation forecloses any reliance upon the findings contained in those acts.

This Court has previously commented on Congress's reluctance to prohibit the simple possession of firearms. As the Court stated in *Scarborough*, it was apparent that the purpose of § 1202(a) "was to proscribe mere possession but that there was some concern about the constitutionality of such a statute. It was that observed ambivalence that made us unwilling in *Bass* to find the clear intent necessary to conclude that Congress meant to dispense with a nexus requirement entirely." 431 U.S. at 575.[32] Petitioner would ask this Court to believe that Congress, presumptively aware of the *Bass* and *Scarborough* pronouncements, considered the nexus between commerce and firearm possession near a school so obvious and substantial that it did not merit mentioning. This Court should not indulge such a theory.

D. Petitioner Misconstrues Cases in Which This Court Has Excused the Absence of Congressional Findings.

Faced with a statute that contains no nexus to commerce and no congressional findings on the subject, petitioner seizes upon the small number of cases—vastly dif-

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[32] The comments of Senator Long, quoted in *Bass* and *Scarborough*, cannot support the Act here. Although Senator Long, the sponsor of Title VI of the Omnibus Crime Control Act of 1968 (which outlawed possession of firearms by convicted felons and others), espoused Congress's power to outlaw any possession that could affect commerce, his rationale and supporting facts were limited to the specifically enumerated possessions that his amendment would reach. See 114 Cong. Rec. 14,773-74 (1968) ("It deals solely with those who have demonstrated that they cannot be trusted to possess a firearm—those whose prior acts—mostly voluntary—have placed them outside of our society.") Moreover, Long proposed only to restrict the types of persons who could possess firearms, and expressly disavowed any intent to "impinge upon the rights of citizens generally to possess firearms for legitimate and lawful purposes." *Id.*

ferent in context—in which this Court has excused the absence of congressional findings. Pet. Br. 14-15. Petitioner's attempt to extract from them a general principle that findings are never necessary is misguided.

In *Perez* v. *United States*, 402 U.S. 146 (1971), the Court reviewed whether Title II of the Consumer Credit Protection Act was a valid exercise of Congress's commerce power, even when the law reached "loan sharking" activities that take place entirely within a state. After recounting Congress's findings, *id.* at 147 n.1,[33] its debates, *id.* at 149-50, and its extensive reports and hearings, *id.* at 155-56, the Court upheld the legislation. In stating that it would "not infer that Congress need make particularized findings in order to legislate," *id.* at 156, the Court was concerned with satisfying itself and the petitioner before it that Congress was justified in finding a substantial connection between petitioner's otherwise local activity and interstate commerce. It did not suggest that findings are never necessary. Rather, in discussing whether loan sharking "may in the judgment of Congress affect interstate commerce," the Court specifically stated that "the findings of Congress are quite adequate on that ground." *Id.* at 154-55.[34]

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[33] Unlike the case at bar, those findings are set out in the statute itself, see Pub. L. No. 90-321, tit. II, § 201, 82 Stat. 146, 159 (1968).

[34] Similarly, petitioner misplaces its reliance on the statement in *Perez* that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class," 402 U.S. at 154 (citation omitted) (emphases in original). That statement refers to situations in which the aggregation of individual conduct has a substantial nexus with interstate commerce, even though any individual instance may occur wholly intrastate or have a minute impact on interstate commerce. *See, e.g., Wickard* v. *Filburn*, 317 U.S. 111 (1942) (growing and consuming one's own wheat); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (purchasing $70,000 worth of goods from out of state). This is not an aggregation case; rather, this case asks whether Congress has properly regu-

That this Court still views congressional findings as necessary to determine a statute's nexus to interstate commerce is evident from its many post-*Perez* decisions that rely on findings when available. See, e.g., *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990) (relying on congressional findings); *EEOC* v. *Wyoming*, 460 U.S. at 231-32 & n.3 (same); *Virginia Surface Mining*, 452 U.S. at 276-79 (same).

The strongest indication that congressional findings are required is found in *Bass*, in which the Court left open the determination "whether, *upon appropriate findings*, Congress can punish the 'mere possession' of firearms." 404 U.S. at 339 n.4 (emphasis added). In deferring that determination, the Court rejected the government's arguments that "Congress is authorized under the Commerce Clause to prohibit generally the possession of firearms" and that "the legislation would be equally valid even had Congress made no findings." Brief for the United States at 18-23, *United States v. Bass* (No. 70-71); *id.* at 20 n.15 (citing *Perez*). Petitioner's arguments in the case at bar differ little from the arguments it made in *Bass*. The Court's specific reference in *Bass* to "appropriate findings," along with its own citation to *Perez*, 404 U.S. at 339 n.4, indicate that the Court did not view the government's arguments as persuasive or view *Perez* as eliminating the requirement of findings.

Nor can petitioner find support in *Heart of Atlanta*, 379 U.S. 241, or *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), in which the Court upheld the constitutionality of the accommodations provisions of the Civil Rights Act of 1964 despite the absence of congressional findings of an interstate nexus. Those decisions must be considered in their proper context. In *Heart of Atlanta*, the Court distinguished its decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), because the Civil Rights Act of 1875 did

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lated the class of activity that is simple possession of any firearm near a school. *See also infra* p. 39 n.37.

not limit the "categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II [of the 1964 act] is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people . . . ." *Heart of Atlanta*, 379 U.S. at 250. The Court then recounted the plethora of testimony before Congress that presented "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." *Id.* at 253.

The statute at issue in *Katzenbach v. McClung* did not outlaw racial discrimination in every public accommodation, but only in those with "operations affect[ing] commerce," defined to include those that serve interstate travelers or in which a substantial portion of the food served has moved in commerce. *McClung*, 379 U.S. at 298. Congress's defining an activity as affecting commerce is equivalent to its finding that the activity affects commerce. See *id.* at 302-03. When the McClungs challenged Congress's presumptive definition, the Court was able to test the nexus to commerce because the "record [was] replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." *Id.* at 299. Far from holding that findings would have been irrelevant, the Court held merely that their absence was not fatal to the statute's validity because "the evidence presented at the hearings [on the Act at issue] fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate." *Id.* at 304.

McClung and *Heart of Atlanta* stand only for the proposition that explicit findings are not required if an act's legislative history contains other, ample evidence of a substantial nexus between the proscribed conduct and interstate commerce. In those cases, the Court could rely on an explicit statutory link to commerce and extensive legislative history supporting that nexus. Here, however, petitioner can point to no explicit statutory link to commerce, no congressional finding, and no legislative history

to support any link between § 922(q) and interstate commerce. Petitioner therefore derives no support for its assertion that congressional findings are not necessary.[35]

No nexus to commerce is contained in the text, findings, or legislative history of the Gun-Free School Zones Act. Petitioner has cited no case in which this Court has upheld a statute's constitutionality without some efforts by Congress to justify the act as an exercise of Commerce Clause authority. Thus, to affirm the court below, this Court need not overrule any precedent. Nor will affirmance embroil the courts in constant review of federal legislation. A serious issue arises only when Congress has stretched its commerce power beyond the "nth degree," *Virginia Surface Mining*, 452 U.S. at 311 (Rehnquist, J., concurring), and has made absolutely no effort to justify that extension. For all these reasons, this Court should affirm the Fifth Circuit's decision that, in the absence of a demonstrated interstate commerce nexus, the Gun-Free

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[35] Petitioner also relies on *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), *overruled by National League of Cities* v. *Usery*, 426 U.S. 833 (1976), *overruled by Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); and Justice Powell's concurrence in *Fullilove* v. *Klutznick*, 448 U.S. 448, 495 (1980). Neither case, however, is relevant to the Act at issue here. In *Wirtz*, the Court held that subsequent extensions of coverage in the Fair Labor Standards Act (FLSA) could be supported by the findings made in the original act, but the constitutionality of the FLSA itself had already been upheld. 392 U.S. at 188-89; see *United States* v. *Darby*, 312 U.S. 100 (1941). In *Fullilove*, the Court considered the constitutionality of minority set-asides. In examining whether Congress had made adequate findings to support its legislation, Justice Powell found it appropriate to review "the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises," *i.e.*, other legislation on the same topic. 448 U.S. at 502, 503 (Powell, J., concurring). By contrast, Respondent Lopez has already demonstrated, see *supra* Part I.C., pp. 29-32, that the Gun-Free School Zones Act differs from other firearms or education statutes previously enacted by Congress. Those earlier congressional findings cannot support the Act.

School Zones Act exceeds the federal jurisdiction conferred by the Commerce Clause.

II. THE GUN-FREE SCHOOL ZONES ACT IS UNCONSTITUTIONAL BECAUSE GUN POSSESSION WITHIN 1000 FEET OF A SCHOOL DOES NOT SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

Even if this Court finds that Congress need not have made formal or informal findings or even have before it concrete evidence of an effect on commerce when passing the Gun-Free School Zones Act, the Act still cannot withstand constitutional scrutiny. Chief Justice Marshall recognized long ago that Congress's power under the Commerce Clause is not unlimited, because "[t]he enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) at 194. Thus, "the power to regulate commerce, though broad indeed, has limits." *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968). Because it regulates non-economic activity without a substantial nexus to interstate commerce, the Gun-Free School Zones Act exceeds those limits.

Regardless of the degree to which Congress has demonstrated the impact of the regulated activity on interstate commerce, this Court has never accepted the conclusions of Congress without question. Rather, the Court has always undertaken its own review of the legislation's propriety under the Commerce Clause. This Court has recognized that the Constitution gave it a "[s]trictly confined though far-reaching power . . . : that of determining whether Congress has exceeded limits allowable in reason for the judgment which has been exercised." *Polish Nat'l Alliance*, 322 U.S. at 650. See also *Virginia Surface Mining*, 452 U.S. at 311 (Rehnquist, J., concurring) ("simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so").

Ordinarily, this Court applies a two-prong test to determine whether legislation constitutes a valid exercise of the Commerce Clause power. First, the Court "defer[s] to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding." Second, the Court considers whether the legislation is "reasonably adapted to the end permitted by the Constitution." *Preseault*, 494 U.S. at 17 (quoting *Virginia Surface Mining*, 452 U.S. at 276). Here, however, there are no findings to which the Court might defer. It follows, then, that the Court's scrutiny is heightened; otherwise, these well-known formulations would be meaningless surplus.[36]

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[36] Petitioner makes two errors in discussing the standard of review. First, it erroneously asserts, Pet. Br. 16, that *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938), requires that any judicial inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." The rational basis test set out in *Carolene Products* is limited by the opinion itself to "regulatory legislation affecting ordinary commercial transactions." *Id.* at 152. The Gun-Free School Zones Act does not regulate ordinary commercial transactions.

Second, petitioner ignores the fundamental differences between Equal Protection and Commerce Clause jurisprudence by arguing that rational basis review here should be identical to that in equal protection cases. Pet. Br. 15-16 & n.7. In contrast to the two-prong analysis of Commerce Clause review, rationality review under the Equal Protection Clause requires merely that the regulation be rationally related to any legitimate state interest. See, e.g., *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988). Further, this Court has consistently reasoned that statutes enacted pursuant to the Fourteenth Amendment raise fewer concerns than those enacted pursuant to the Commerce Clause. *See Gregory*, 111 S. Ct. at 2405 ("the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *cf. EEOC* v. *Wyoming*, 460 U.S. at 243 & n.18; *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980). This distinction is based on the fact that Equal Protection analysis is substantive, whereas Commerce Clause analysis is jurisdictional. The Equal Protection Clause, whether by way of the Fifth or Fourteenth Amendment, is

As to both prongs, the Act falls both short and wide of the mark. There is no basis for a finding that the possession of firearms near schools has a "substantial economic effect on interstate commerce," nor is the Act reasonably adapted to the ends that it assertedly furthers.

A. There Is Insufficient Basis to Conclude That the Conduct Regulated Has a Substantial Economic Effect on Interstate Commerce.

Although Congress's commerce power extends to those intrastate activities that have an indirect effect on interstate commerce, *Perez*, 402 U.S. at 151-52; *Wickard v. Filburn*, 317 U.S. at 125, their impact must still be substantial. This Court has never "declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that, when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." [37] *Wirtz*, 392 U.S. at 196 n.27. See also *Heart of Atlanta*, 379 U.S. at 275 (Black, J., concurring) ("every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws"). Thus,

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not a grant of power but a restriction on the exercise of powers granted elsewhere. By contrast, the Commerce Clause is a grant of power, and to say that a law is "rational" does nothing to answer the question whether the legislature had the power to enact it in the first place.

[37] Thus, this case is distinguishable from *Perez*. Perez argued that although he was a member of the class, his activity did not affect commerce. That argument was rejected. 402 U.S. at 154. Respondent Lopez here argues that when the "total incidence" of the conduct regulated is considered, it does not significantly affect commerce. *See also supra* p. 33 n.34.

although the distinction between direct and indirect effect is no longer controlling, it is still a distinction to be considered in determining whether the effect is substantial. See *NLRB* v. *Jones & Laughlin*, 301 U.S. at 37.

The Act at issue here goes beyond the traditional direct-indirect dichotomy. Petitioner, focusing on the elimination of the direct-indirect distinction, loses sight of the Court's reliance in *Wickard* on the proposition that the reach of Congress's commerce power depends on an "economic measure." *Wickard*, 317 U.S. at 124; see also *id.* at 125 (Congress may regulate a local activity "if it exerts a substantial economic effect on interstate commerce"). Merely possessing a firearm near a school is local, non-economic conduct, far removed from the "commercial intercourse" between states that is the core of the Commerce Clause. See *Gibbons*, 9 Wheat. (22 U.S.) at 189-90. Through the Act, Congress is attempting to regulate a non-economic activity for its effect on local commerce, which in turn affects interstate commerce. Approval of such a regulation would be unprecedented, because all of this Court's Commerce Clause decisions involving regulated classes of activity have involved activity that was economic, even if it was local.[38]

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[38] See, e.g., *Garcia*, 469 U.S. 528 (employment); *EEOC* v. *Wyoming*, 460 U.S. 226 (employment); *Hodel* v. *Indiana*, 452 U.S. 314 (1981) (coal mining); *Virginia Surface Mining*, 452 U.S. 264 (coal mining); *Perez*, 402 U.S. 146 (loan sharking); *Wirtz*, 392 U.S. 183 (employment); *McClung*, 379 U.S. 294 (restaurants); *Heart of Atlanta*, 379 U.S. 241 (accommodations at inns and hotels); *Polish Nat'l Alliance*, 322 U.S. 643 (employment); *Wickard*, 317 U.S. 111 (farming and wheat markets); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (milk sales); *Darby*, 312 U.S. 100 (employment); *Jones & Laughlin*, 301 U.S. 1 (employment); *Gibbons*, 9 Wheat. (22 U.S.) 1 (navigation). Moreover, as the court below noted, previous firearms statutes of general application have related to transportation, transfer, or licensing, not mere possession of any firearm. Pet. App. 8a. *See, e.g., Barrett* v. *United States*, 423 U.S. 212 (1976) (§ 922(h), receipt of firearm); *Huddleston* v. *United States*, 415 U.S. 814 (1974) (§ 922(a)(6), pawnshop transaction).

Petitioner attempts to justify this radical extension of the commerce power by tracing firearms possession to two specific economic effects. First, petitioner argues that violence has an economic effect on commerce because of its effect on insurance rates. Pet. Br. 17. Closer analysis reveals, however, that this is not a specific economic effect at all, because every insurance claim affects insurance rates, and every activity has the potential for an injury and a subsequent insurance claim. Thus, virtually every activity potentially affects the insurance industry. At least two courts of appeals have rejected similiar insurance arguments. See *United States* v. *Voss*, 787 F.2d 393, 397 (8th Cir.) (rejecting argument that property owner's purchase of insurance from interstate insurance carrier provides even *de minimis* connection to commerce), *cert. denied*, 479 U.S. 888 (1986); *United States* v. *Barton*, 647 F.2d 224, 232 (2d Cir.) (same), *cert. denied*, 454 U.S. 857 (1981).

Second, petitioner attempts to invoke this Court's decision in *Heart of Atlanta*, 379 U.S. 241, by arguing that "violent crime affects interstate commerce by reducing the willingness of other individuals to travel to areas within the country that are perceived to be unsafe." Pet. Br. 18. Because this argument would overextend *Heart of Atlanta*, it should be rejected. *Heart of Atlanta* recognized that interstate commerce includes the movement of persons through the states, but that decision reasoned that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof . . . which might have a substantial and harmful effect upon that commerce." *Id.* at 255-56, 258. Accommodations in inns and hotels are clearly an "incident" of interstate travel, but the same cannot categorically be said of firearms possession. Petitioner's reliance on the *Heart of Atlanta* rationale reveals just how expansive its argument is. This argument bears no relation to schools and would apply equally well to any other place where petitioner could predicate an effect on interstate commerce

from the perceptions of third persons unrelated to the regulated activity.

Straying even farther from the commerce power's core, Petitioner argues that some of the guns that are possessed on or near school property may be used in crimes that will affect the economy, or may be used in ways that will interfere with the students' education, thereby eventually affecting the economy. Pet. Br. 9, 17-25. These effects, if they occur at all, are far too speculative to bear a substantial relation to interstate commerce. See *Heart of Atlanta*, 379 U.S. at 275 (Black, J., concurring) (Commerce Clause does not encompass speculative effects). The activity regulated in this case, the mere possession of a firearm, has too tenuous an effect on interstate commerce to be considered substantial. Countless forces and currents act upon our nation's economy. Accepting petitioner's argument that Congress may regulate any activity that has an arguable effect on commerce, even if the activity is non-economic in nature, would destroy the Constitution's limits on federal jurisdiction.[39]

B. The Statute Is Not Reasonably Adapted to Its Intended Goal.

Even if firearm possession can rationally be found to have some effect on commerce by way of its effect on violent crime or education, § 922(q)(1) still exceeds the jurisdiction of the Commerce Clause because it is not reasonably adapted to those ends. The effects on interstate commerce that petitioner alleges all relate to the use of firearms, not to possession itself. Congress is aware of the difference between use and possession of firearms, as it has demonstrated in outlawing both "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c) ("uses or carries a fire-

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[39] See Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 42 (1987).

arm"). *Cf. United States* v. *Long*, 905 F.2d 1572, 1578 n.10 (D.C. Cir.) (Thomas, J.) ("[a] person can possess a gun without either 'using it' or using it 'during and in relation to' a given crime"), *cert. denied*, 498 U.S. 948 (1990).

Congress could have—but did not—frame § 922(q)(1) to require an "intent to use" element.[40] It separately addressed actual use by proscribing, as a distinct offense, the discharge or attempted discharge of a firearm within 1000 feet of a school. See 18 U.S.C. § 922(q)(2). Obviously, firearm discharge is more closely related to violence or disruption of schools than mere possession, and the separate proscription of this offense further exposes the attenuated relationship between simple possession and interstate commerce.

Section 922(q)(1) exhibits none of the tailoring that characterizes other federal criminal statutes. It is not limited to crimes affecting commerce. *Cf.* 18 U.S.C. § 1951 (Hobbs Act, proscribing interference with commerce by threats or violence). It does not prohibit disruption of the activity it seeks to protect. *Cf.* Freedom of Access to Clinic Entrances Act of 1994, 108 Stat. 694, Pub. L. No. 103-259 (to be codified at 18 U.S.C. § 248) (criminalizing disruption of reproductive health services); Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (codified as 18 U.S.C. § 43) (denouncing disruption of animal enterprises). Instead, the statute broadly proscribes possession of a firearm within a school zone, regardless of whether it is used to commit a violent crime or to disrupt education.

Moreover, it cannot be said that a broader ban on mere possession is reasonably adapted to effectuate Congress's

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[40] Possession with a proscribed intent is a concept well known to federal criminal law. *See, e.g.*, 18 U.S.C. § 472 (possession of counterfeit obligation with intent to defraud); 21 U.S.C. § 841(a)(1) (possession of controlled substance with intent to distribute).

goal of preventing firearm usage. The difference between mere possession and use is patent and it does not present the problem of indistinguishability or commingling that would justify regulating the broad to reach the narrow. *Cf.* 21 U.S.C. § 801(5) (congressional finding that "controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate").

Nor has there been a showing that gun violence is more prevalent in school zones than elsewhere so as to justify expanding regulation to those areas. This Court has recently noted that simple possession of firearms occurs in 50 percent of American homes. See *Staples* v. *United States*, 114 S. Ct. 1793, 1801 & n.8 (1994) (citing Justice Department statistics). It can reasonably be expected that this proportion would hold for the large number of homes that happen to be within 1000 feet of the grounds of a public, parochial, or private school. The data presented to Congress by *amicus* Center to Prevent Handgun Violence and other data first cited by petitioner in its brief indicate that, although school gun violence is tragic, it is not pandemic. See *House Hearing* at 83, App. 4, Table 2 (over half of school gun incidents occurred in only six states) (submission by Center to Prevent Handgun Violence); *The National Education Goals Report: Building a Nation of Learners*, Ex. 109 (noting that no more than 4 percent of students in eighth, tenth, or twelfth grades surveyed carried weapons habitually, and "weapons" included knives and clubs), *cited at* Pet. Br. 21.

That there may be no legitimate reason to possess a firearm on school grounds does not mean there is no legitimate reason to possess one nearby. Congress has often recognized that there are legitimate reasons for private gun ownership, such as hunting, trapshooting, target shooting, and personal protection. See *supra* p. 31. Thus, even if school gun violence might be said to substantially affect commerce, absent a showing of a causal relationship

between the frequency of firearm possession within school zones and instances of school gun violence, expanding the Act's proscription of firearms in a manner that will substantially interfere with legitimate firearm ownership fails the test of reasonable adaptation.

Similarly, any argument that firearm possession must be broadly proscribed to achieve the purpose of the Act is belied by the Act's exemption of all private property. 18 U.S.C. § 922(q)(1)(B)(i). The armed criminal who takes as hostages in their own home the mother and her children living next door to a school will escape § 922 (q)(1)'s penalty, while the licensed hunter transporting his sporting rifle on an elevated, controlled-access highway 999 feet from the farthest part of the school yard risks five years in a federal penitentiary. Thus, even as the statute ignores serious crimes perpetrated near schools, it will still "burden law-abiding citizens with respect to the acquisition, possession, or use of firearms," an effect that Congress specifically disclaimed on repeated occasions. Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449; Pub. L. No. 90-618, § 101, 82 Stat. 1213; Pub. L. No. 90-351, § 901(b), 82 Stat. 226.

Most importantly, the Act cannot have a significant impact on gun possession near schools, or on school gun violence, because it does not act upon the largest segment of school populations: minors. By operation of federal juvenile delinquency law, 18 U.S.C. § 5032,[41] the Act is limited in its application to persons over age 18—a tiny fraction of all primary and secondary school students. The statistics presented to the House by *amicus* Center for Handgun Violence demonstrate that 83 percent of reported school shootings involved offenders under the

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[41] Federal juvenile delinquency laws defer extensively to state authorities. See *id.* (prosecution of juvenile may not be initiated unless Attorney General certifies both (1) that state does not have or refuses to assert jurisdiction or does not have adequate programs and (2) there is substantial federal interest to warrant exercise of federal jurisdiction).

age of 18. See *House Hearing* at 85, App. 4, Table 7. Thus the Act, which did not amend federal juvenile delinquency law, cannot be reasonably related to the ends it seeks to achieve.

In sum, the Act not only fails to control those most likely to possess guns at schools (juveniles), it also exempts as many possessions near schools as it includes, without regard to intended use. Moreover, the Act criminalizes peaceable firearm possessions that do not affect school or interstate commerce, including possessions when the school is closed. The Act is thus both overinclusive and underinclusive in a manner that prevents it from being considered a reasonable means to meet its laudable goals.

Petitioner attempts to avoid the problems presented by the "reasonably tailored" requirement by painting with an extremely broad brush: "We believe that violent crime *in general* imposes sufficient burdens on interstate commerce to permit Congress very broad latitude to enact measures rationally designed to reduce its incidence." Pet. Br. 44 (emphasis in original). Similarly, petitioner would divine from previous legislation funding education an emergent "national consensus regarding the importance of primary and secondary education to American productivity and competitiveness," *id.* at 24-25, and would distill from previous firearms statutes a "common premise" that "the presence of guns in the wrong hands and the wrong places can have destructive and destabilizing effects," *id.* at 43.

These arguments do not meet the "reasonably adapted" requirement of the Commerce Clause. Under petitioner's reasoning, anything with a putative effect on education or America's competitiveness would be a proper subject for federal regulation. If this were so, there would be no principled way to preclude the federalization of all criminal law or of education.[42] But the Constitution did

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[42] The selection of curriculum and textbooks affects students' education much more directly than does the possession of a firearm near a school. By petitioner's reasoning, school book selection

not vest in Congress a general police power, and Congress has otherwise disclaimed desire to regulate all aspects of education. At end, such power would be antithetical to our country's commitment to the principles of federalism, wherein "lies the promise of liberty." *Gregory*, 111 S. Ct. at 2400. The Commerce Clause has a limit, and Congress passed it in enacting § 922(q)(1).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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would be a prime candidate for federal control. Indeed, petitioner's argument that disruption of education substantially affects interstate commerce by reducing academic achievement directly contradicts the assertion of *amici* Center to Prevent Handgun Violence et al. that the effects of guns in schools are "of an entirely different character and magnitude than the consequences of slide rule possession and use." *Amici* Br. at 23 n.37. If anything, slide rules, or their electronic equivalent, have a more direct, and therefore greater influence on academic achievement and, by petitioner's reasoning, interstate commerce.

APPENDIX A

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 921. Definitions

(a) As used in this chapter—

* * *

(25) The term "school zone" means—

(A) in, or on the grounds of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term "school" means a school which provides elementary or secondary education, as determined under State law.

18 U.S.C. § 922. Unlawful acts

(q)(1)(A) It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) shall not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtain such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under the law to receive the license;

(iii) which is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack which is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(2)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm at a place that the person knows is a school zone.

(B) Subparagraph (A) shall not apply to the discharge of a firearm—

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(3) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun-free school zones as provided in this subsection.

APPENDIX B

INDEX OF STATE LAWS DIRECTLY OR INDIRECTLY ADDRESSING FIREARM POSSESSION ON SCHOOL CAMPUSES

I. LAWS CRIMINALIZING POSSESSION OF FIREARMS ON OR NEAR SCHOOL CAMPUS

Alaska	ALASKA STAT. §§ 11.61.195(a)(2)(A), 11.61.220(a)(4)(A) (Supp. 1993) (felony)
Arizona	ARIZ. REV. STAT. ANN. § 13-3102(A)(12) (Supp. 1993) (misdemeanor or felony)
Arkansas	ARK. CODE ANN. § 5-73-119(a)(2)(A), (a)(3)(A) (Michie Supp. 1993) (felony)
California	CAL. PENAL CODE § 626.9 (Deering Supp. 1994) (felony)
Colorado	COLO. REV. STAT. ANN. § 18-12-105.5 (West Supp. 1993) (misdemeanor)
Connecticut	CONN. GEN. STAT. ANN. § 53a-217(b) (West Supp. 1994) (felony)
Florida	FLA. STAT. ANN. §§ 790.115, 810.095 (West Supp. 1994) (felony)
Georgia	GA. CODE ANN. § 16-11-127.1 (Michie Supp. 1994) (felony)
Idaho	IDAHO CODE § 18-3302C (Supp. 1994) (concealed firearms) (misdemeanor)
Illinois	ILL. ANN. STAT. ch. 720, para. 5/24-1(a)(12) (Smith-Hurd Supp. 1994) (felony)
Indiana	IND. CODE ANN. 35-47-9-2 (Burns Supp. 1994) (felony)

Kansas	KAN. STAT. ANN. § 21-4202(a)(4) (Supp. 1993) (misdemeanor)
Louisiana	LA. REV. STAT. ANN. §§ 14:95(A)(5), 14:95.2, 14:95.6 (West Supp. 1994) (misdemeanor or felony)
Maine	ME. REV. STAT. ANN. tit. 20-A, § 6552 (West 1993) (misdemeanor)
Maryland	MD. ANN. CODE art. 27, § 36A (1992) (misdemeanor)
Massachusetts	MASS. GEN. L. ch. 269, § 10(j) (1992) (misdemeanor)
Michigan	MICH. COMP. LAWS ANN. § 750.243d (1)(c) (West 1994) (misdemeanor)
Minnesota	MINN. STAT. ANN. § 609.66(1d) (West Supp. 1994) (felony)
Mississippi	MISS. CODE ANN. § 97-37-17 (1973) (student possession) (misdemeanor)
Missouri	MO. ANN. STAT. § 571.030.1(8) (Vernon Supp. 1994) (misdemeanor)
Montana	MONT. CODE ANN. § 45-8-334 (1993) (felony)
Nevada	NEV. REV. STAT. § 202.265 (1993) (misdemeanor)
New Jersey	N.J. STAT. ANN. § 2C:39-5e(1) (West Supp. 1994) (misdemeanor)
New Mexico	N.M. STAT. ANN. § 30-7-2-1 (Michie Supp. 1993) (felony)
New York	N.Y. PENAL LAW § 265.01(3) (McKinney 1989) (misdemeanor)
North Carolina	N.C. GEN. STAT. § 14-269.2(b) (1993) (misdemeanor or felony)

North Dakota	N.D. CENT. CODE § 62.1-02-05 (1985) (misdemeanor)
Ohio	OHIO REV. CODE ANN. § 2923.122 (Anderson 1993) (felony)
Oklahoma	OKLA. STAT. ANN. tit. 21, § 1277 (West Supp. 1994) (misdemeanor); § 1280.1 (West Supp. 1994) (felony)
Oregon	OR. REV. STAT. § 166.370 (1993) (felony)
Pennsylvania	18 PA. CONS. STAT. ANN. § 912 (1983) (misdemeanor)
Rhode Island	R.I. GEN. LAWS § 11-47-60 (Supp. 1993) (felony)
South Carolina	S.C. CODE ANN. §§ 16-23-420, 16-23-430 (Law. Co-op. Supp. 1993 (misdemeanor or felony)
South Dakota	S.D. CODIFIED LAWS ANN. § 13-32-7 (Supp. 1994) (misdemeanor)
Tennessee	TENN. CODE ANN. § 39-17-1309 (1991) (misdemeanor or felony)
Texas	TEX. PENAL CODE ANN. § 46.04(a)(1) (West Supp. 1994) (felony)
Utah	UTAH CODE ANN. § 76-10-505.5 (Supp. 1993) (misdemeanor); § 76-3-203.2 (Supp. 1993) (use of firearm) (felony)
Vermont	VT. STAT. ANN. tit. 13, § 4004 (Supp. 1993) (misdemeanor)
Virginia	VA. CODE ANN. § 18.2-308.1 (Michie Supp. 1994) (felony)
Washington	WASH. REV. CODE ANN. § 9.41.280 (West Supp. 1994) (misdemeanor)

West Virginia	1994 W. Va. Acts Ch. 37 (S.B. 46) (eff. Aug. 1, 1994) (to be codified as W. VA. CODE § 61-7-11a) (misdemeanor)
Wisconsin	WIS. STAT. ANN. § 948.605 (West Supp. 1993) (misdemeanor).

II. LAWS REQUIRING THAT STUDENTS POSSESSING FIREARMS ON CAMPUS BE SUSPENDED OR EXPELLED

Alabama	ALA. CODE § 16-1-24.1 (Supp. 1993)
Arkansas	ARK. CODE ANN. § 6-21-608 (Michie 1993)
California	CAL. EDUC. CODE § 48900(b) (Deering 1987); § 48915(b) (Deering Supp. 1994)
Delaware	DEL. CODE ANN. tit. 14, § 4112(c) (Supp. 1993)
Indiana	IND. CODE ANN. § 20-8.1-5-4(b)(1) (Burns Supp. 1994)
Kentucky	KY. REV. STAT. ANN. § 158.150(1)(a) (Michie/Bobbs-Merrill 1992)
Texas	TEX. EDUC. CODE ANN. § 21.3011(b)(4) (West 1994)
Washington	WASH. REV. CODE ANN. § 9.41.280 (West Supp. 1994)

III. LAWS HOLDING THIRD PERSONS LIABLE FOR MINOR'S FIREARM POSSESSION ON CAMPUS

Illinois	ILL. ANN. STAT. ch. 720, para. 5/24-3.3 (Smith-Hurd 1993) (delivery of firearms to minors at school)
Massachusetts	MASS. GEN. L. ch. 269, § 10(j) (1992) (misdemeanor for school personnel to fail to report any unlawful possession of handgun at school)

Mississippi	MISS. CODE ANN. § 97-37-17 (1973) (misdemeanor for teachers to allow student to possess firearm at school)
North Carolina	N.C. GEN. STAT. § 14-269.2(b) (1993) (felony to aid minor carrying firearm at school)
Oklahoma	OKLA. STAT. ANN. tit. 21, § 858 (West Supp. 1994) (fine for parents allowing student to possess firearm at school)
Tennessee	TENN. CODE ANN. § 39-17-1312 (Supp. 1993) (misdemeanor for parents allowing student to possess firearm at school).

IV. LAWS PROHIBITING POSSESSION OF FIREARMS BY MINORS

Alaska	ALASKA STAT. § 11.61.220(a)(3) (Supp. 1993) (consent of parent required)
Arizona	ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993), *amended by* 1994 Legis. Serv. ch. 109 (H.B. 2131)
Arkansas	ARK. CODE ANN. § 5-73-119(a)(1)(A) (Michie Supp. 1993)
Hawaii	HAW. REV. STAT. § 134-7(e) (1991) (certain minors prohibited)
Idaho	IDAHO CODE § 18-3302D (Supp. 1994) (minors prohibited from carrying concealed firearms at school)
Nebraska	NEB. REV. STAT. § 28-1204 (1989)
New Hampshire	N.H. REV. STAT. ANN. § 207:2-a (Supp. 1993) (prohibiting minors possessing firearms for hunting, unless accompanied by adult)

V. LAWS PROHIBITING DELIVERY OF FIREARMS TO MINORS

Arizona	ARIZ. REV. STAT. ANN. § 13-3109(A) (1989), *amended by* 1994 Legis. Serv. ch. 109 (H.B. 2131) (felony)
Connecticut	CONN. GEN. STAT. ANN. § 29-34 (1990) (felony)
Illinois	ILL. ANN. STAT. ch. 720, para. 5/24-3 (a), (b) (Smith-Hurd 1993) (felony)
Iowa	IOWA CODE ANN. § 724.22(1) (West 1993) (misdemeanor)
Kansas	KAN. STAT. ANN. § 21-4203(a)(1) (Supp. 1993) (misdemeanor)
Louisiana	LA. REV. STAT. ANN. § 14:91 (West 1986) (misdemeanor)
Maryland	MD. ANN. CODE art. 27, § 406 (1992) (misdemeanor)
Massachusetts	MASS GEN. L. ch. 140, § 130 (Supp. 1994) (fine)
Minnesota	MINN. STAT. ANN. § 609.66(1)(6), (1b) (West Supp. 1994) (misdemeanor)[1]
Missouri	MO. ANN. STAT. § 571.060.1(2) (Vernon Supp. 1994) (misdemeanor)
Nevada	NEV. REV. STAT. § 202.310 (1993) (misdemeanor)
New Hampshire	N.H. REV. STAT. ANN. § 159:12 (1986) (misdemeanor)
New York	N.Y. PENAL LAW § 265.16 (McKinney Supp. 1994) (felony)

[1] The penalty is increased if delivery occurs within a school zone.

North Carolina	N.C. GEN. STAT. § 14-315 (1993) (misdemeanor)
Oklahoma	OKLA. STAT. ANN. tit. 21, § 1273 (West Supp. 1994) (misdemeanor)
Rhode Island	R.I. GEN. LAWS §§ 11-47-30, 11-47-37 (1993) (felony)
Tennessee	TENN. CODE ANN. § 39-17-1316(a) (Supp. 1993) (misdemeanor)

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Idaho	IDAHO CODE § 31-872 (Supp. 1994) (counties); § 50-343 (1994) (cities)
Kentucky	KY. REV. STAT. ANN. § 65.870 (Michie/Bobbs-Merrill Supp. 1992)
Maine	ME. REV. STAT. ANN. tit. 25, § 2011 (West Supp. 1993)
Mississippi	MISS. CODE ANN. § 45-9-51 (1993)[2]
Missouri	MO. ANN. STAT. § 21.750.2 (Vernon Supp. 1994)
Montana	MONT. CODE ANN. § 45-8-351(1) (1993)[3]
Nevada	NEV. REV. STAT. § 244.364.1 (1993) (counties); § 268.418 (cities)

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[2] Mississippi law provides an exception allowing local governments to regulate firearm possession at schools. See MISS. CODE ANN. § 45-9-53(f)(iii) (1993).

[3] Montana law provides an exception allowing local governments to regulate firearm possession at schools. See MONT. CODE ANN. § 45-8-351(1) (1993).

North Dakota	N.D. CENT. CODE § 62.1-01-03 (1985)
Oklahoma	OKLA. STAT. ANN. tit. 21, § 2189.24 (West Supp. 1994)
Pennsylvania	18 PA. CONS. STAT. ANN. § 6120 (Supp. 1994)
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No. 93-1260

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent and his amici assert three basic challenges to the Gun-Free School Zones Act, 18 U.S.C. 922(q) (Supp. IV 1992). First, they argue that the absence of congressional "findings" renders the Act unconstitutional, or at least precludes its application absent case-specific inquiry into the impact on interstate commerce of a particular violation. Second, they contend that the Act effects an impermissible interference with state prerogatives. Finally, they assert that the Act is not a rational means of pursuing goals that lie within Congress's power under the Commerce Clause. These arguments are without merit.

A. In *United States* v. *Bass*, 404 U.S. 336, 349 (1971), this Court reaffirmed the longstanding interpretive principle that "unless Congress conveys its

purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Relying on *Bass* and other cases articulating similar principles, see Resp. Br. 21-23, respondent argues that the Gun-Free School Zones Act is invalid because "Congress was aware that the Act would tread on traditional and significant areas of state regulation, yet it made no findings on the importance to interstate commerce of such an intrusion." *Id.* at 23.

The decisions upon which respondent relies have no relevance to the present case. This Court has made clear that the "maxim[] of statutory construction" enunciated in *Bass* will "only apply when [the Court is] uncertain about the statute's meaning." *United States* v. *Culbert*, 435 U.S. 371, 379 (1978) (internal quotation marks omitted). The statute at issue in *Bass* provided that a convicted felon "who receives, possesses, or transports in commerce or affecting commerce * * * any firearm" would be guilty of a federal crime. 404 U.S. at 337 (quoting 18 U.S.C. App. 1202(a) (1970)). The Court recognized that "[t]he critical textual question is whether the statutory phrase 'in commerce or affecting commerce' applies to 'possesses' and 'receives' as well as to 'transports.'" 404 U.S. at 339. The other cases cited by respondent, see Resp. Br. 22-23, similarly involve the interpretation of ambiguous statutory texts.[1]

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[1] See *Gregory* v. *Ashcroft*, 501 U.S. 452, 465 (1991) (whether state court judges are "appointee[s] on the policymaking level"); *United States* v. *Enmons*, 410 U.S. 396, 397, 400 (1973) (whether extortion, defined by the statute as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," includes violent acts during labor strike intended to achieve legitimate union objectives); *Rewis* v. *United States*, 401 U.S. 808, 809-812 & n.1 (1971) (whether statutory prohibition on "travel[] in interstate or foreign

The present case, by contrast, does not involve the interpretation of an ambiguous statute. Congress identified with precision the conduct forbidden by the Gun-Free School Zones Act, and respondent's actions clearly fall within the statutory prohibition. Respondent does not deny that he possessed a firearm at a place that he knew to be a school zone, and he does not contend that his conduct was covered by one of the enumerated exceptions to the statutory ban. As in *United States* v. *Culbert*, "here Congress has conveyed its purpose clearly," and the Court should "decline to manufacture ambiguity where none exists." 435 U.S. at 379.

In particular, there is no basis for respondent's contention that the Gun-Free School Zones Act may be deemed ambiguous "because it does not indicate whether Congress intended a case-by-case determination of the activity's connection with interstate commerce." Resp. Br. 18.[2] As this Court has long recognized,

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commerce" in order to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" applies to proprietors of illegal gambling operation whose customers included interstate travelers); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 350-355 & n.1 (1941) (whether Federal Trade Commission's statutory authority to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" gave it jurisdiction over intrastate sales; Court emphasized (*id.* at 355) that "[t]his case presents the narrow question of what Congress did, not what it could do"); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 481-483 (1940) (whether violent labor strike constituted "restraint of trade or commerce among the several States" within the meaning of the Sherman Act). The decision in *United States* v. *Five Gambling Devices*, 346 U.S. 441 (1953), is discussed at note 3, *infra*.

[2] Respondent also points out, however, that the absence of such an "affecting commerce" element was brought to Congress's attention and that therefore "Congress's omission of any nexus

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

United States v. *Darby*, 312 U.S. 100, 120-121 (1941). Thus, where Congress has defined a class of activity without reference to an "affecting commerce" element, and has determined that all conduct within the class is prohibited, case-by-case inquiry regarding impacts on interstate commerce is inappropriate. See *Perez* v. *United States*, 402 U.S. 146, 152-154 (1971).[3]

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element from § 922(q) cannot be considered a mere oversight." Resp. Br. 14. Respondent does not attempt to reconcile his claim of statutory ambiguity with his assertion that Congress deliberately declined to require that a commerce nexus be proved on a case-by-case basis.

[3] In *United States* v. *Five Gambling Devices*, 346 U.S. 441 (1953), the Court considered the question whether a statutory requirement that manufacturers and dealers must report "all sales and deliveries of gambling devices" applied to transactions involving no movement of goods in, or established effect upon, interstate commerce. Three Justices would have construed the

B. In contending that clear statement principles compel the adoption of congressional findings, respondent implicitly argues that Congress's failure to announce its *reasons* for legislating creates a statutory ambiguity comparable to that which exists when the intended scope of the legislation is unclear. There is no basis for that contention. This Court has recently reaffirmed that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994). See also *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2102 (1993) (noting that the Court "never require[s] a legislature to articulate its reasons for enacting a statute");

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statute to contain such a nexus requirement in order to avoid constitutional difficulties. See *id.* at 442-452 (Jackson, J.). (Respondent relies upon Justice Jackson's analysis, see Resp. Br. 22, albeit without identifying it as a plurality opinion.) Two Justices concluded that the plain language of the statute foreclosed this reading, see *id.* at 452 & n.* (Black, J., concurring), but concurred in the judgment on the ground that the statute was unconstitutionally vague in other respects (*i.e.*, in its reporting requirements). *Id.* at 453-454. The other four Justices also concluded that the statute permitted no case-by-case inquiry into effects on interstate commerce, noting that "[i]t would be difficult for Congress to be more explicit than to direct the statute's mandate, as it has here, to 'every' manufacturer and dealer without qualification." *Id.* at 454 (Clark, J., dissenting). Those Justices would have held that the statute, construed to cover all sales and deliveries, was neither vague nor beyond Congress's commerce power; they would therefore have sustained the convictions. *Id.* at 456-463. Thus, six Justices in *Five Gambling Devices* concluded that a facially unqualified statutory requirement or prohibition cannot be "construed" to require a case-by-case showing of a nexus to interstate commerce, even where such a construction would avoid a substantial constitutional question.

Katzenbach v. *McClung*, 379 U.S. 294, 299 (1964) (noting, in Commerce Clause context, that "no formal findings were made, which of course are not necessary"); cf. *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Respondents cite no authority for the proposition that Congress's failure to explain reasons for its decision to enact a statute whose meaning is plain creates a statutory ambiguity to which clear statement principles apply.

Nor is there merit to respondent's related contention that "[f]indings serve the ends of liberty by ensuring that legislation which might upset these carefully balanced structures [of federalism and separation of powers] is enacted only after due consideration." Resp. Br. 28. Procedural rules designed to ensure that all facets of an issue have been considered are central to the review of administrative agency decisions, but they have no application to judicial review of Acts of Congress. In *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980), for example, the Court "disagree[d] with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it"; the Court observed that "[t]he language of the statute is clear, and we have historically assumed that Congress intended what it enacted." Moreover, in some instances different Members of Congress may have different reasons for supporting a particular legislative proposal. If a bill achieves passage in both Houses and is signed by the President, there is no constitutional basis upon which a court could strike the law down simply because majorities within the Senate and House of Representatives did not or could not agree upon a particular statement of findings or reasons for its passage. The resulting statutory enactment is no less effective for

constitutional purposes than is a judgment of a court that is not supported by a majority opinion.

C. This Court has, we acknowledge, sometimes used the word "finding" in articulating the standard applicable to Commerce Clause review. See, *e.g.*, *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990) ("We evaluate this claim under the traditional rationality standard of review: we must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'") (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)). The Court's application of that standard in *Preseault*, however, belies any inference that a formal statement of reasons is required. Neither the statute at issue in *Preseault* nor the accompanying committee reports contained express congressional "findings," nor did the statute or reports refer to the Commerce Clause. See National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48; H.R. Rep. No. 28, 98th Cong., 1st Sess. (1983); S. Rep. No. 1, 98th Cong., 1st Sess. (1983). Based upon its examination of the statute and its legislative history, however, a unanimous Court concluded that "[t]wo congressional purposes are evident," 494 U.S. at 17, and that those purposes bore a constitutionally sufficient relationship to interstate commerce. *Id.* at 17-18. The decision in *Preseault* thus exemplifies (as we argue in our opening brief) that the relevant congressional "finding" can be "merely implicit in the enactment itself." Gov't Br. 17 n.8.

D. Finally, respondent simply ignores the substantial body of prior congressional findings regarding the importance of educational performance to the nation's productivity and economic competitiveness. See Gov't Br. 35-40. The Commerce Clause clearly furnishes an appropriate basis for legislation reasonably designed to

enhance the productivity of American workers and thereby strengthen the country's economic position. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937). Although the extensive congressional findings cited in our opening brief were made in connection with legislation enacted under the Spending Clause, those findings have repeatedly stressed not simply the importance of educational achievement to the national welfare generally, but its particular significance to the functioning of the national economy. If any judicial assessment of the adequacy of Congress's deliberations were appropriate, the relevant body of evidence would include findings made in connection with earlier legislative enactments, not simply the legislative "record" underlying the Gun-Free School Zones Act itself. Cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring).

II. Respondent and his amici vigorously argue that the Act effects a substantial intrusion on state prerogatives, and particularly on state and local control over primary and secondary education. The basis for this contention is unclear. As we point out in our opening brief, see Gov't Br. 28-29, Congress in crafting the Gun-Free School Zones Act has taken substantial care to respect the policy choices of state and local governments. Thus, individuals acting pursuant to various forms of authorization by state and local officials are exempted from the Act's prohibitions. See 18 U.S.C. 922(q)(1)(B)(ii) and (iv)-(vii) (Supp. IV 1992).[4] In addition,

[4] There is no basis for respondent's assertion that "the Act purports to grant local authorities powers that the states have expressly forbidden them." Resp. Br. 24; see also *id.* at 24-25 n.21. Nor is there any merit to the Pacific Legal Foundation's contention that the Act "requires the States to license firearms."

the Act expressly provides that it shall not be construed to preempt state or local gun-free school zones laws. 18 U.S.C. 922(q)(3) (Supp. IV 1992); see also 18 U.S.C. 927.[5]

Amicus Br. 18 n.6. The Gun-Free School Zones Act does not require state or local officials to do *anything*, nor does it purport to empower them to act in a manner that state law forbids. The statute simply provides that *if* state or local officials authorize (in any of a variety of ways) the possession of firearms within a school zone, the federal prohibition will not apply. Congress's decision to make the applicability of federal law contingent upon the absence of specified actions by state and local authorities is fully consistent with this Court's decisions. Cf. *New York* v. *United States*, 112 S. Ct. 2408, 2424 (1992) ("where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation").

[5] As we acknowledge in our opening brief, see Gov't Br. 29 n.18, Section 922(q) does displace state policy choices to the limited extent of prohibiting conduct that may be permissible under the law of a State. Amici National Conference of State Legislatures, et al., noting that "many States have adopted more expansive interpretations of individual rights under their state constitutions and statutory law than is required by the federal constitution," suggest that the Act thereby effects a constitutionally problematic interference with state prerogatives. Amici Br. 29-30. This argument is without merit. Unquestionably States have broad discretion to determine that individuals within their borders should be given greater protections *against the state government* than the federal Constitution provides. Under the Supremacy Clause, however, the States have no authority to "protect" their residents from the application of federal law.

Respondent points out that state felony charges against him were dismissed after the federal prosecution was commenced. Resp. Br. 2. There is, however, no constitutional bar to successive federal and state prosecutions for the same criminal conduct. See, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 89 (1985); *United States* v. *Wheeler*, 435 U.S. 313, 316-320 (1978). Presumably Texas officials

Nor is there merit to respondent's contention that acceptance of the government's constitutional arguments would permit Congress to regulate all aspects of primary and secondary education. See, *e.g.*, Resp. Br. 46, 46-47 n.42 ("By petitioner's reasoning, school book selection would be a prime candidate for federal control."). Under this Court's decision in *New York* v. *United States*, *supra*, very different constitutional issues would be presented if Congress imposed statutory requirements or prohibitions directly upon state and local educational officials, or if Congress mandated that state and local governments assume responsibility for the enforcement of federal law. See Gov't Br. 27-28. Section 922(q), however, neither impairs the authority of state and local officials to run their schools as they see fit nor enlists them in the Act's enforcement. Indeed, one of the principal virtues of the Gun-Free School Zones Act is that it assists States and localities in the conduct of their educational mission in a manner that does not impinge upon their control over curriculum or educational policy.[6]

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concluded that a Section 922(q) prosecution, conducted by federal officials at federal expense, would adequately serve the State's penal objectives. That choice by state officials is not evidence of federal intrusion on state prerogatives.

[6] It can hardly be disputed that, as a general matter, the presence of firearms is incompatible with the optimal functioning of primary and secondary schools. State and local officials might reasonably determine, however, that in some limited contexts (*e.g.*, a gun safety class) the presence of firearms could serve an educational purpose. Because gun possession "by an individual for use in a program approved by a school in the school zone" is permitted under the Act, see 18 U.S.C. 922(q)(1)(B)(iv) (Supp. IV 1992), the federal statute will not interfere with such choices.

III. Respondent also contends that, even if no congressional findings are necessary, the Gun-Free School Zones Act is invalid because it "regulates non-economic activity without a substantial nexus to interstate commerce." Resp. Br. 37. As we explain in our opening brief, however, violent crime in any setting can be expected to have substantial economic consequences that cannot be confined to a single State. See Gov't Br. 17-18; see also 16 Members of the United States Senate, et al. Amici Br. 12-19. Measures reasonably designed to reduce the incidence of violent crime are therefore well within Congress's power under the Commerce Clause.

In any event, whatever the scope of Congress's power to combat violent crime generally, Congress has unquestioned authority to address threats to the proper functioning of institutions that are of particular concern to the national economy. As our opening brief extensively explains, the government's position in this case is amply supported by two propositions: (a) that a ban on gun possession in primary and secondary schools can be expected to improve the functioning of the educational process, and (b) that the effective operation of primary and secondary schools is likely to have a substantial impact on the health of the national economy. Respondent has wholly failed to demonstrate that either of these propositions is irrational.[7]

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[7] Amici National Conference of State Legislatures, et al., argue that some standard more demanding than rational basis review should apply where the propriety of Congress's ends (as opposed to the suitability of the means it has chosen) is called into question. See Amici Br. 7, 18, 23. Amici cite no authority for this proposition, which is directly contrary to this Court's repeated recognition that "[t]he pertinent inquiry * * * is * * * whether Congress could rationally conclude that the regulated activity

A. Respondent attacks Congress's decision to proscribe the "mere possession" (as distinct from discharge, or possession with intent to use) of firearms in school zones. See Resp. Br. 42-44. Congress could reasonably conclude, however, that gun possession on and around school premises would detrimentally affect the educational process, both by increasing the likelihood of violent incidents and by undermining the efforts of teachers and administrators to create an atmosphere of safety and stability within the school environment. Compare 18 U.S.C. 930 (1988 & Supp. IV 1992) (prohibiting the possession of firearms within a federal facility).[8] Indeed, respondent takes pains to emphasize that possession of a firearm on a school campus is a felony under Texas law, see Resp. Br. 2, 24 n.19, and notes as well that "nearly every state punishes firearm possession on school grounds as a crime." *Id.* at 24.

Respondent also argues that the Act will be ineffective because it cannot be applied (as a result of federal statutes governing criminal prosecution of juveniles) to persons under 18 years of age. See Resp. Br. 45-46 (citing 18 U.S.C. 5032 (1988 & Supp. IV 1992)). It is

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affects interstate commerce." *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981). Amici's suggestion is, at bottom, no more than a new guise for inviting judicial intrusion into legislative policymaking.

[8] As respondent points out, see Resp. Br. 12 n.5, the statutory ban on firearms possession in federal facilities is based upon the Property Clause. Thus, 18 U.S.C. 930 (1988 & Supp. IV 1992) has no bearing on the question whether the performance of primary and secondary schools can be expected to affect the national economy. Section 930 *is* relevant, however, to the question whether a ban on firearms possession is a rational means of enhancing the effectiveness of an institution whose functions are (for whatever reason) a proper subject of federal concern.

admittedly likely that a sizeable percentage of violations of the Gun-Free School Zones Act will be committed by juveniles. A substantial number of students (such as respondent), however, reach their eighteenth birthday before graduating from high school. Such persons, as well as non-students age 18 or older who violate the Act, remain subject to federal prosecution. See 18 U.S.C. 5031 ("a 'juvenile' is a person who has not attained his eighteenth birthday"). Moreover, federal officials may institute delinquency proceedings against juveniles who violate Section 922(q) if state law does not proscribe the conduct in question or if state authorities decline to prosecute. See 18 U.S.C. 5032(1) (1988 & Supp. IV 1992) (Attorney General may institute delinquency proceedings in federal district court if she certifies that "the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency").[9] The Act thus increases the likelihood that juveniles who possess firearms on or near school grounds will be subject to punishment in *some*

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[9] Section 5032 also provides for federal delinquency proceedings based upon a certification that "the offense charged is a crime of violence that is a felony or an offense described in [one of several enumerated statutory provisions], and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction." 18 U.S.C. 5032(3) (1988 & Supp. IV 1992). The statutory provision establishing penalties for violations of the Gun-Free School Zones Act provides that "for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor," 18 U.S.C. 924(a)(4) (Supp. IV 1992), and Section 922(q) is not one of the specific statutory provisions listed in Section 5032(3). Section 5032(3) therefore does not provide a basis for initiation of federal delinquency proceedings based upon a juvenile's violation of Section 922(q).

forum. The fact that only a subset of the statute's violators will face prosecution in federal court does not render the Act irrational, just as the same consideration does not render irrational numerous other federal criminal prohibitions of conduct that may be committed by either adults or juveniles.

B. Throughout the decade that preceded passage of the Gun-Free School Zones Act, a wide array of political, business, and academic leaders repeatedly stressed the importance of primary and secondary education as a determinant of national economic success. See Gov't Br. 22-25, 35-40. Respondent essentially ignores this evidence, resting on the conclusory assertion that possible deleterious effects on the country's economy "are far too speculative to bear a substantial relation to interstate commerce." Resp. Br. 42. It is well established, however, that "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broadcasting*, 114 S. Ct. at 2471. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, moreover, Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Ibid.* (citations and internal quotation marks omitted). The supposition that deficiencies in primary and secondary education will have substantial long-term economic consequences cannot be deemed irrational simply because those consequences cannot be forecast with mathematical precision.

That the performance of primary and secondary schools is closely linked to long-term economic prosperity is not simply plausible on its face.

Respondent blinks reality in disparaging as "speculative" a proposition that is the subject of broad consensus within the political, business, and academic communities. Respondent and his amici seek to persuade the Court that in passing the Gun-Free School Zones Act Congress has "pushed the envelope"—that the statute may be sustained only if Congress's power under the Commerce Clause is essentially unlimited. Congress's power to pass laws "necessary and proper" for the regulation of interstate commerce is indeed broad, and growing broader: "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." *New York* v. *United States*, 112 S. Ct. at 2419.[10] But it requires no great creativity to recognize that the safety of the nation's schools can be expected to have substantial long-term impacts on the performance of the national economy. Indeed, if one sought to identify a sphere of activity so devoid of impact upon the national economy as to make it off limits as a subject of federal regulation under the commerce power, it is difficult to imagine a less plausible candidate than primary and secondary education. Whatever the outer reaches of Congress's authority under the Commerce Clause, the Gun-Free School Zones Act is well within constitutional limits.

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[10] In *Preseault*, for example, a unanimous Court concluded that the goal of encouraging the development of additional recreational trails provided a valid basis for legislation under the Commerce Clause. 494 U.S. at 17-18.

For the reasons stated above, and in the opening Brief for the United States, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1994

(18)

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No. 93-1260

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to Rule 25.5 of the Rules of this Court, the United States submits this supplemental brief to inform the Court of recently enacted legislation relating to the question presented in this case.

This case presents the question whether 18 U.S.C. 922(q) (Supp. IV 1992), which prohibits the possession of firearms in and around primary and secondary schools, is a constitutional exercise of Congress's power under the Commerce Clause. In our petition for a writ of certiorari, we noted that a bill passed by the Senate in November 1993 "include[d] specific findings that the actions proscribed by Section 922(q) affect interstate commerce." Pet. 6 n.4. The petition explained that the House of Representatives had not passed a comparable provision, *ibid.*; we noted as well that "[e]ven if such a

provision is enacted into law * * * it will not resolve the conflict in the courts of appeals regarding the validity of prosecutions under the existing statute." *Ibid.* Our opening brief also alluded to the pendency of this legislative proposal. Gov't Br. 6 n.2.

On September 13, 1994, the President signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322. Section 320904 of that legislation amends 18 U.S.C. 922(q) (Supp. IV 1992) to include congressional findings regarding the effects upon interstate and foreign commerce of gun possession in and around schools. A copy of Section 320904 is included as an appendix to this brief.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1994

APPENDIX

Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125 (1994), provides as follows:

GUN-FREE SCHOOL ZONES.

Section 922(q) of title 18, United States Code, is amended— .

(1) by redesignating paragraphs (1), (2), and (3) as paragraphs (2), (3), and (4), respectively; and

(2) by inserting after "(q)" the following new paragraph: "(1) The Congress finds and declares that—

"(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

"(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

"(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;

"(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

"(E) while criminals freely move from State to State, ordinary citizens and foreign

visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

"(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

"(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

"(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

"(I) Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.".

(4)

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In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALFONSO LOPEZ, JR.,

Respondent.

On Writ Of Certiorari
From The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICI CURIAE

CHILDREN NOW
PROJECT ON CHILDREN AND VIOLENCE
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I. INTEREST OF AMICI CURIAE

Children NOW is a nonpartisan policy and advocacy organization for children, with offices in Oakland, Los Angeles, Sacramento, and Washington, D.C. Children NOW has led efforts that resulted in significant public policy victories for children in California, including the extension of major new health care benefits for over 625,000 at-risk children and important reforms in the child support system. One of Children NOW's primary goals is to promote legislation and support programs that create an environment for children that is safe from the dangers of guns.

The Project on Children and Violence is an association of university faculty and students and the law firm of Orrick, Herrington & Sutcliffe. The Project undertakes multidisciplinary research and analysis of issues pertaining to children and violence to identify key problems and advocate change through the legal system. The Project was founded at Stanford University by students, faculty and alumni from the Department of Sociology, the School of Law, and the Haas Center for Public Service. The Project is entirely separate from Stanford University, which is not involved in these individually determined issues. Part of the information in this brief was collected by the Project.

Youth ALIVE is a non-profit agency based in Oakland, California. Its mission is to reduce violent deaths and injuries to youth, which result primarily from firearms, by providing a public health perspective on firearm availability and violence. Among other things, Youth ALIVE researches and documents the effect of violence on public health, has authored numerous papers and reports on gun violence and the economic impact of firearm injuries, and has provided expert testimony and technical assistance regarding gun violence prevention ordinances.

Children's Law Offices, Inc. represents children in a wide variety of civil and administrative matters directly affecting their rights and welfare. Examples include appellate issues regarding children, juvenile court dependency actions,

mental health and special education matters, disability issues, terminations of parental rights, custody permanency planning and placement disputes. Children's Law Offices is a recognized expert in the fields of special education and the rights of handicapped and abused children. Children's Law Offices serves approximately 250 children per year.

II. SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit held below that Congress had no power to pass a law that is designed to protect children from the carnage caused by guns in the schools of our 50 states. *United States v. Lopez*, 3 F.3d 1342 (5th Cir. 1993). According to the Fifth Circuit, the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922q, violates the Commerce Clause because "the management of education . . . has traditionally been a state charge . . . . " *Id.* at 1366.

The Gun-Free School Zones Act, however, does not regulate education; it regulates the possession of guns in and near schools, an activity that derives from interstate commerce, and directly affects interstate commerce and the national economy in profound ways. When a child in one state is threatened or murdered by a gun at school, it is likely that the gun was imported from another state, and it is certain that the reverberations of such violence affect our state and national economies and our state and national health and welfare systems. There is a clear interstate nexus justifying Congressional regulation.

The purpose of this brief is to provide this Court information compiled from the research of the *amici curiae* that documents the epidemic of gun violence in our nation's schools and its profound effects on commerce among all 50 states. Analysis of the legal issues is left to the Government. The facts recited in this brief should leave no question that Congress could properly forbid persons from bringing instruments of destruction onto our schools as a matter affecting interstate commerce. To hold otherwise would jeopardize the

health, safety and welfare of our children and the ability of this nation to depend on future generations of educated, productive and capable individuals to sustain our system of fundamental rights and freedoms.

Amici curiae support petitioner, the United States of America, and urge reversal of the decision of the Fifth Circuit Court of Appeals.

III. ARGUMENT

In 1990, American teenagers in our 50 states ran the greatest risk of being murdered of any segment of the United States population, and teenagers between the ages of 15 and 19 suffered the greatest increase in murder rates.[1] More youths die on the streets every 100 hours than were killed in 100 hours of groundwar in the Persian Gulf.[2]

Most often, the execution of our children occurs through the barrel of a gun. According to a report by the National Center for Health Statistics, ***in 1990 alone*** nearly 4,200 teenagers were killed by guns.[3] Not including accidental deaths and suicides, 120 American children under the age of 18 are slain by gunfire each month.[4]

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[1] *1990 Murder Toll – Initial Projections for the Use of the Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990).

[2] Gordon Witkin, *et al., Kids Who Kill*, U.S. News & World Report, Apr. 8, 1991, at 26, citing Louis Sullivan, Secretary of the Department of Health and Human Services.

[3] *See* The Washington Post, Mar. 24, 1993, at A4.

[4] Richard Price, *Violence 'spreading like wildfire'*, USA Today, May 9, 1994, at 1A. From 1986 to 1990, 10,052 children ages 5-19 were murdered with guns in America, and an additional 9,213 died from guns unintentionally or in suicides. L.A. Fingerhut, *Firearm Mortality Among Children, Youth and Young Adults 1-34 Years of Age, Trends and Current Status: United States, 1986-90*, in *Advance Data from Vital and Health Statistics*, No. 231, NCHS, Table 3, Ages 5-19 (1993). In 1986, 61 percent of homicides among boys and 32 percent of homicides among girls involved firearms. *Fatal Injuries to Children – United States, 1986*, 8 JAMA, 264 (1990).

It is critical for our children, and for our society, that schools be a safe haven, providing an environment conducive to the acquisition of skills and values that will prepare them to lead society productively into the future. But that is not the reality today. Across our nation, violent crime in our schools is a deadly epidemic. In a survey conducted by the National School Boards Association, 39 percent of responding urban school districts reported a shooting or knifing in their schools last year, and 23 percent reported drive-by shootings.[5] Our children are the primary targets of this violence. In a 1987 National Adolescent Student Health survey of 11,000 eighth and tenth grade students, 34 percent had been threatened with harm, 14 percent had been robbed and 13 percent were attacked while they were at school or on a school bus during the previous year. In 1989, over 400,000 students aged 12 to 19 were victims of violent crime in or around their schools within the previous six months.[6] In 1991-92, in Los Angeles public schools alone, 383 students were assaulted with a deadly weapon.[7]

Teachers are also victims. In 1987, it was reported to Congress that approximately 5,200 teachers are physically attacked during the year in our nation's secondary schools.[8] According to statistics compiled by the United States Department of Justice, *each day* in the United States 6,250 teachers are threatened with violence and 260 teachers are physically assaulted.[9]

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[5] Elizabeth Shogren, *More Violence Seen in Schools Than 5 Years Ago*, Los Angeles Times, Jan. 6, 1994, at 17.

[6] Bastian & Taylor, *School Crime: A National Crime Victimization Survey Report*, U.S. Dep't of Justice (1991).

[7] *Everyone Should Be Scared*, Los Angeles Times, Sept. 26, 1993, at E1.

[8] National Institute of Education, *Violent Schools – Safe Schools: The Safe School Study Report to the Congress*, (1978).

[9] Charlie Weaver, *When kids pack a gun instead of a lunch*, Star Tribune, Feb. 10, 1993, at A17.

Our schools have become a primary location for violence against our children. According to the "Teenage Victims" report released in May, 1991, by the Bureau of Justice Statistics, about 37 percent of violent crimes and 81 percent of crimes of theft against younger teenagers occur ***at school***.

There is, of course, no panacea for the violence infecting our schools.[10] But it is beyond argument that the overwhelming presence of guns in our schools has contributed mightily – and mortally – to the violent disruption of the education of our children. Guns and gun violence directly affect education, health care costs, and gun trafficking, each of which has interstate consequences and profoundly and directly affects our national economy.

A. GUNS IN THE SCHOOL: GUN POSSESSION AND GUN-RELATED VIOLENCE IN OUR SCHOOLS.

1. A Gun For Every Classroom.

Kids have guns,[11] and they take them to school for a variety of reasons.[12]

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[10] *Amici curiae* expressly take no position regarding the propriety of the punishment provided by the Gun-Free School Zones Act, or the means or nature of its enforcement.

[11] A survey by the National Institute of Justice of 1,600 male students in 10 inner-city high schools found that 22 percent owned at least one gun. Over 80 percent of those who had guns had a semi-automatic handgun. *See Numbers tell a grim story,* USA Today, May 9, 1994, at 9A; *Scary Survey on Youths, Guns,* Washington Post, Dec. 13, 1993, at A1.

[12] Most of the students who carry guns to school say that they do so for protection on their way to and from school; younger students are more likely to carry a gun to show off or to intimidate other students. S. Glazer, *Violence in Schools, CQ Researcher.* 1992; 2:787-807. D. Calhoun, N. Gannon, *Students and Guns,* (unpublished survey of 261 Oakland, California junior and senior high school students, on file with the Oakland Gun and Safety Task Force) (1988). In suburban Jefferson Parish, Louisiana, where 21 percent of high schoolers say they have carried a gun in the past

The number of guns in our schoolrooms is staggering. According to the Department of Justice, every single day in this nation 100,000 children take a gun to school.[13] More recent sources show that approximately 270,000 guns are taken to school each day.[14] Each year, some 400,000 boys carry handguns to school.[15]

The percentage of children who bring guns to school is about one per classroom. In a national survey in 1987, one of every 36 tenth grade boys said they had carried a handgun to school in the past year. One in every hundred boys took that gun to school nearly every day.[16]

Gun possession is even more frequent in some areas. A survey of students at 31 Illinois high schools revealed that one in 20 students had carried a gun to school in 1990.[17] In one American city, one out of every 15 eleventh grade boys has carried a handgun to school.[18] Almost half of all male students in Baltimore, Maryland, have carried a handgun.[19]

Gun possession in our schools is rapidly increasing. The number of students suspended for having guns in Memphis, Tennessee schools tripled between 1987 and 1991.[20] The number of guns confiscated in the California public schools

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year, 73 percent say they did so for protection. *When Killers Come to Class, Violence in Schools*, U.S. News & World Report, Nov. 8, 1993, at 34.

[13] *See* Weaver, *supra.*

[14] *When Killers Come To Class, supra,* at 31.

[15] Center to Prevent Handgun Violence, *Caught in the Crossfire: A Report on Gun Violence in Our Nation's Schools* (1990).

[16] The National Adolescent Student Health Survey, *A Report on the Health of America's Youth*, Tables 2-29 (1989); Callahan & Rivara, *Urban High School Youth and Handguns.* 267 JAMA 3038-42 (1992).

[17] *Trends & Issues 1991*, Illinois Criminal Justice Information Authority.

[18] *When Killers Come to Class, supra,* at 34.

[19] Circuit Court for Baltimore City, Grand Jury Report on Juveniles: Firearms (1987).

[20] *School Security Report*, Vol. 9, No. 3 (Jan. 1993).

doubled between 1985 and 1988. High schools experienced the greatest increase, but more guns were found at all grade levels, including kindergarten through sixth.[21] In 1990, California schools experienced a 40 percent increase in the presence of firearms.[22]

On any given day, the odds are good that when a teenager sits down in an urban high school classroom, as the teacher calls the class to order for the lessons of the day, at least one of the students is packing a gun.

2. Schoolhouse As Gun Supermarket.

Schools across the country are rapidly becoming the marketplace of choice for the sale or trade of firearms. Another generation may have arrived at school to trade baseball cards; now, some of our children sell and trade guns.

In the instant case, the defendant was paid $40 to take a gun to school to be used by another youth in a gang fight. Throughout the country, students reporting that they can easily obtain a handgun say that they would most likely get guns from friends, rather than on the street.[23] In 1992, school administrators in Houston discovered that a student was running a gun rental service on campus.[24] Gunmakers are ***targeting*** kids by pandering weapons that look just like the instruments of death featured in the movies, complete with laser sights, detachable clips and other gadgets, for about $100 – less than the cost of popular shoes. Gunmakers have tapped into the hype used for designer sneakers and logo-

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[21] California Department of Education, *School Crime in California for the 1988-1989 School Year,* Standard School Crime Reporting Program (Mar. 1990).

[22] *Hearings Before the Subcomm. on Crime and Criminal Justice, House Comm. on the Judiciary*, 101st Cong., 1st Sess., 650-651 (1991) (statement of Dr. Ronald D. Stephens, Executive Director, National School Safety Center).

[23] Callahan & Rivara, *supra.*

[24] Gregory Freeman, *Guns in School: Deadly Issue,* St. Louis Post-Dispatch, Nov. 27, 1992, at 1E.

jackets.[25] Restrictions placed on licensed gun dealers and other forms of gun control simply do not apply to weapons acquired at the schoolhouse gun market.

3. Guns At School Mean Death At School.

It is not surprising that the guns in our schools fuel violence in our schools. An argument between students that previously might have resulted in a fistfight may now be resolved by a gunfight. Guns also give students a feeling of power and control, which can lead to confrontation and resolution of disputes by pulling the trigger.

Gun-related bloodshed has become painfully obvious. In the academic years 1986 through 1990, at least 71 people – 65 students and 6 school employees – were killed with guns at school; another 201 were severely wounded; and 242 were held hostage at gunpoint.[26] During that same period, shootings or hostage situations in schools were reported in at least 35 states and the District of Columbia.[27]

In some urban areas across our country, gun violence has become so severe[28] that schools have installed metal detectors, hired extra security and added "drive-by-shooting drills" to traditional fire drills.[29] The effects of the diversion of precious and dwindling education and health funds are obvious and detrimental in all 50 states – money is being spent on security and protection rather than on education.

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[25] USA Today, May 9, 1994, at 1A; *see also* Violence Policy Center, *Cease Fire* (Feb. 1994).

[26] Center to Prevent Handgun Violence, *supra.*

[27] *Id.*

[28] In New York City alone, six students were shot and killed and 13 were shot and wounded in school buildings during the 1991-92 school year. *School Violence: Two Ways to Fight Back,* Governing 20 (March 1993). About 45 percent of the 758 students interviewed at 10 inner city public high schools in California, New Jersey, Louisiana and Illinois said they had been threatened with a gun or had been shot at on the way to or from school during the previous few years. *Scary Survey on Youths, Guns, supra.*

[29] *When Killers Come to Class, supra,* at 32.

The page limitations for this brief do not permit a full account of even the more serious incidents of gun violence that occurred in our schools over the past few years. To illustrate the pervasive interstate effects of gun violence in schools, the following is a sampling of selected devastating incidents from all parts of our country, both urban and rural, in both public and private schools. The level of this violence clearly justifies Congressional regulation:

Houston, Texas: In September 1985, a 16-year-old sophomore had a grudge against assistant principal Marvin Webster, Jr., because he had sent the boy home earlier in the month with a note to his parents about his haircut. As a crowd of 600 students looked on, the boy opened fire in the school cafeteria. His first shot severed Webster's spinal cord. Another bullet ricocheted off the wall and hit a 16-year-old student.[30]

Virginia Beach, Virginia: In December 1988, a 16-year-old student walked into Atlantic Shores Christian School carrying a semi-automatic handgun and six magazines containing 192 rounds of ammunition in his backpack. He shot one teacher twice, chased another through the school firing shots at her back, and killed another. A fourth teacher tackled the boy, saving the lives of a roomful of crying and praying teenagers. "The only friend I had was my gun," the boy said as he was led by police from the scene, "and you already took that from me."[31]

Las Vegas, Nevada: In August 1990, a 16-year-old student was shot to death when gunfire erupted during a gang fight in a high school cafeteria just before the first day of school was to begin.[32]

Birmingham, Alabama: In November 1990, an 11-year-old girl was caught in the crossfire of a gunfight between two

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[30] Earnest L. Perry, *Man shoots wife, self on grounds of school*, Houston Chronicle, Nov. 14, 1992, at A33.

[31] Erik Larson, *The Story Of A Gun*, The Atlantic, Jan. 1993, at 48.

[32] *Youth Slain In School Gang Fight*, Los Angeles Times, Aug. 27, 1990, at P2.

15-year-old students at a middle school. She was shot to death.[33]

New York, New York: In December 1990, a feud between a South Bronx youth gang and a group of students over a teenage girl resulted in one of the students being shot to death in front of the school.[34]

Milwaukee, Wisconsin: On Valentine's Day, 1991, a 12-year-old student became angry when some friends were teasing him. He ran off the playground, fetched a silver .25 semi-automatic pistol, and returned, firing it repeatedly through the opening of the fenced-in playground.[35]

Rapid City, South Dakota: In September 1991, a 17-year-old with a sawed-off shotgun took 22 fellow students hostage and shot up a classroom.[36]

Salt Lake City, Utah: In September 1991, an assistant football coach was shot in the leg on the first day of school when he intervened in a fight between gang members.[37]

Crosby, Texas: In September 1991, Arthur Jack, the 17-year-old captain of the varsity football team and junior prom prince, was getting orange juice in the breakfast line at his school cafeteria. He heard someone say, "You called me a bitch." He looked up and saw a 15-year-old girl pointing a .38 caliber revolver. Jack tried to get away, but the girl fired a bullet into his back. The bullet pierced his heart. The assailant waved the gun in the direction of the other students, who fell to the ground like dominoes. Jack died on the floor behind the serving counter.[38]

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[33] *Students caught in crossfire on nation's school campuses*, U.S. Newswire, Nov. 15, 1990.

[34] Mitch Gelman, *Boy, 15 Killed; Teen Arrested . . .*, Newsday, Dec. 21, 1990, at 6.

[35] *Kids Who Kill, supra*, at 31.

[36] Jim Abrams, *From inner cities to rural heartland, violent start to school year*, AP, Sep. 22, 1991.

[37] *Id.*

[38] It's Not Just New York, Newsweek, Mar. 9, 1992, at 25.

Seattle, Washington: In October 1991, a 16-year-old middle school student shot his teacher with a pellet gun while she was grading papers in her classroom. The teacher had given him a failing grade, which made him ineligible for football.[39]

New York, New York: In February 1992, Thomas Jefferson High School was swarming with security guards preparing for a visit from New York City Mayor David Dinkins. A 15-year-old boy went to school looking for schoolmates Ian Moore, 17, and Tyrone Sinkler, 16. Sinkler had recently transferred to Jefferson because a student was shot in his last school. Ninety minutes before Mayor Dinkins arrived for a speech, the boy walked up to Moore and Sinkler in a second-floor hallway and, without saying a word, shot them point-blank and killed them. A 16-year-old classmate, Marlon Smith, was so distraught over the killings that school personnel called his mother at work. She hurried home, finding her son in her bedroom. He had shot himself in the head, and died shortly thereafter. Just three months before in the same high school, a 14-year-old boy, who said he was trying to help his brother, had murdered a 16-year-old student and seriously wounded a teacher in the school hallway.[40]

Tulsa, Oklahoma: In January 1992, a 17-year-old high school senior accused a 14-year-old freshman of stealing a coat he was wearing. The freshman shot him.[41]

Tucson, Arizona: In October 1992, a tenth grader was shot at point-blank range in a student parking lot at his high school. The incident is believed to have been gang-related.[42]

Birmingham, Alabama: In November 1992, four young men chased a 16-year-old around the campus as they tried to

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[39] *'Arms Race' in Schools – Students Say They Pack Guns For Protection*, The Seattle Times, Mar. 10, 1992, at A1.

[40] John Shanahan, *Two students killed in NYC High School before Mayor's visit*, AP, Feb. 26, 1992.

[41] Shirley Ragsdale, Gannett News Service, Feb. 5, 1992.

[42] *Roll Call of the Dead*, People, Jun. 14, 1993, at 50.

steal his athletic jacket. One of them shot him in the back of the head.[43]

Chicago, Illinois: In November 1992, a seventh grader shot himself with a .22 caliber pistol during homeroom class. It is believed that he thought the gun, which he had brought to school on previous days, was not loaded.[44]

Richardson, Texas: In November 1992, a 17-year-old junior at a Dallas-area high school was shot to death near the school after a football game.[45]

Chicago, Illinois: In November 1992, 15-year-old DeLondyn Lawson was shot dead in a hallway at Tilden High School, victim of a dispute between two other students about a dice game. He was the second student in 10 days to be shot to death in a Chicago public school.[46]

Washington, D.C.: In January 1993, teenage members of rival gangs clashed in a school for pre-kindergarten to ninth grade students. Security guards and police broke up the fight and herded the gang members into a band room. When a security guard went outside the room to calm the gathering crowd, a 14-year-old boy shot him in the stomach with a .22 caliber revolver. A spokesperson reported that classes were not cancelled and "Students were calm on the whole." "It was a normal school day," she said.[47]

Bridgeport, Connecticut: In January 1993, two children were murdered outside their elementary school, one in full view of students and teachers.[48]

Carter County, Kentucky: In January 1993, a 17-year-old honors student walked into class late. As his classmates

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[43] *Id.* at 51.

[44] *Id.*

[45] Maria Greene, *Safe or Scary?*, The Dallas Morning News, May 30, 1993, at 6.

[46] *Body count rises in public schools*, Chicago Tribune, Nov. 24, 1992, at 18.

[47] Brian Reilly, *Security guard shot at Southeast school . . .*, The Washington Times, Jan. 29, 1993, at A1.

[48] *When Killers Come to Class*, *supra*, at 34.

silently read their assignments, his teacher, who a few weeks before had refused his demand to change one of his midterm grades, corrected papers. The boy pulled a revolver from his jacket and fired a .38 caliber bullet into his teacher's right temple. One day before her 49th birthday, she lay dead. When the school's custodian came to the classroom, the student fired a shot into the custodian's stomach, killing him as well. He held his classmates hostage, taunting them, as one of them wrote a goodbye note to her parents. Twenty minutes later, he surrendered to police.[49] (A 1990 bill that would have made it a crime to carry a gun onto school grounds in that county had been defeated by the National Rifle Association and rural lawmakers.)

Los Angeles, California: In January 1993, a tenth grader was killed when a .357 magnum in another student's backpack accidentally discharged.[50]

Middle River, Minnesota: In February 1993, a 14-year-old eighth grader, toting a 30-30 rifle he had brought to his middle school, walked through the music room where a teacher was giving a lesson, and into a storeroom. Then he shot himself in the head. No one knows why.[51]

Reseda, California: In February 1993, a 15-year-old dropout, who had bragged about carrying a gun the previous week, confronted a 17-year-old senior in the hallway of the science building during a midmorning snack break. As the other students watched, he fired at his victim, killing him instantly. The assailant was arrested two blocks away from the school, eating a raspberry donut.[52]

Pennsburg, Pennsylvania: In May 1993, a soft-spoken 15-year-old, who attended church youth group meetings, shot a tenth grader to death by firing twice into his head in front of 22 students. The gunman, at 5 ft./4 in., said his victim, at 6 ft.

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[49] *The Tragedy in Room 108*, U.S. News & World Report, Nov. 8, 1993, at 41.

[50] *Roll Call of the Dead, supra*, at 51.

[51] *Id.*

[52] *Id.*

5 in. and the largest student in his high school, had been picking on him about his height.[53]

Princeton, West Virginia: In May 1993, a 15-year-old high school student took 20 people hostage and fired a shotgun at the principal.[54]

Atlanta, Georgia: In August 1993, a ninth grader was murdered and a tenth grader wounded when another student, who had had a fistfight with his younger victim the previous day, opened fire in the crowded cafeteria.[55]

Los Angeles, California: In September 1993, a 15-year-old was waiting in line to transfer into the school. He heard an argument between other students. As he turned to see what was happening, he was shot in the back and the chest.[56]

Charlotte, North Carolina: In September 1993, a 14-year-old student at a rural high school was arrested for shooting a classmate on the sidewalk as school was dismissed.[57]

Washington, D.C.: In September 1993, two junior high school students sprayed the crowded schoolground with semi-automatic weapons.[58]

Somerville, New Jersey: In September 1993, a 17-year-old was charged with attempted murder after shooting another student.[59]

Chicago, Illinois: In September 1993, a 17-year-old who served as his high school's mascot was gunned down after a football game. He was in a car when a student from another school walked over, put a gun to his head and pulled the trigger.[60]

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[53] *Id.*

[54] Andrea Stone, *Kids, guns: 'It's shoot or be shot'*, USA Today, June 3, 1993, at 1A.

[55] *When Killers Come to Class*, *supra*, at 32.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

Butte, Montana: In April 1994, 11-year-old Jeremy Bullock stood in line to enter his elementary school. A *fourth-grade* boy walked up carrying a .22 semi-automatic pistol. He loaded the gun and fired three times at no one in particular. A bullet blasted through Jeremy's skull, just behind his ear, and killed him. In the principal's office, the 10-year-old gunman stared stoically into space, muttering, "Nobody loves me."[61]

Nashville, Tennessee: In April 1994, 13-year-old Terrence Murray sat in his seat, watching Walt Disney's *Beauty and the Beast* in his darkened classroom. Terrence was a quiet boy who had sickle cell anemia. Behind him, a 14-year-old classmate, who would later say he had no quarrel with Terrence, wrapped a jacket around his hand, raised a gun to the back of Terrence's skull, and blew his head off.[62]

Not all of the blood in our schoolyards is shed at the hands of students. Outsiders come onto or near the school grounds, guns in hand, and terrorize our children:

Stockton, California: In 1989, a crazed gunman, armed with an AK-47 assault rifle, fired on a crowded school yard. Five children were executed; 29 children and 1 teacher were wounded.

Olivehurst, California; In May 1992, an unemployed 21-year-old, who was unhappy with the treatment he had received during high school, stopped by a local gun shop, loaded an ammunition belt and donned a camouflage hunting vest. Carrying a .22 caliber rifle over his shoulder, a 12-gauge shotgun in his hands, and two bandoliers of ammunition, he returned to his alma mater, working his way through the halls and classrooms. Three students and one teacher were killed; at least 10 people were treated for gunshot wounds; and as many as 80 hostages were held at gunpoint during the 8-hour

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[61] Richard Price, *supra.*

[62] *Id.* at 5A.

siege, which ended when the gunman surrendered to deputies. Ten of the child hostages were exchanged for some pizza.[63]

Houston, Texas: In November 1992, the chair of the special education department and mother of three was confronted by her estranged husband. As he chased her with a .45 semi-automatic pistol, she started to run in front of the school, then changed directions, apparently realizing what would happen if he started shooting in the school. He caught up to her, shot her dead, and turned the gun on himself.[64]

Acushnet, Massachusetts: In April 1993, a 42-year-old man with a history of mental illness took a shotgun into a middle school and announced, "This is a hostage situation." He took the school principal, librarian and nurse hostage, then shot the school nurse in the back, killing her.[65]

B. JOHNNY CAN'T READ BECAUSE JANE HAS A GUN: THE EFFECT OF GUN POSSESSION AND GUN-RELATED VIOLENCE ON EDUCATION.

In *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954), this Court declared that "education is perhaps the most important function of state and local governments." The Court continued:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance

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[63] Jennifer Bjorhus, *Bad Grade Resulted In Rampage?*, Sacramento Bee, Jun. 18, 1993; *Mass murder court case delayed*, UPI, Sept. 28, 1992; *4 dead after standoff with gunman at California school*, Chicago Tribune, May 2, 1992, at 16.

[64] *Roll Call of the Dead*, *supra*, at 50; Earnest L. Perry, *supra*.

[65] Jonathan Yenkin, *Principal Describes Shooting At Middle School*, AP, Apr. 17, 1993; Tom Coakley, *School nurse is shot, killed*, The Boston Globe, Apr. 15, 1993, at 1.

> of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. *See School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 230, 83 S.Ct. 1560, 1576 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.") Guns in and near our schools devastate this most precious resource.

1. Effect Of Violence On Victims, Students, Families and Teachers.

It is undisputed that "violent school crimes arouse destructive fears among students, parents and teachers."[66] Gunshots petrify children in our schools long after the echoes have subsided in the halls. After two students were murdered at a Connecticut elementary school, "Kids didn't want to go to class, they couldn't eat or sleep, they burst out crying."[67] After a double-murder and hostage situation in a rural Kentucky high school:

> There was little pattern to the post-trauma reactions. One girl slept on the couch in her living room with a parent on the floor beside her. Another studied at home because she couldn't go back into the building. One boy had to sit next to the door in all his classes because he felt trapped anywhere else in

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[66] Jackson Toby, *Violence in Schools, Research in Brief*, National Institute of Justice, Dec. 1983, at 3.

[67] Jettie Tisdale, principal of Longfellow Elementary School, Bridgeport, Connecticut, quoted in *When Killers Come to Class, supra*, at 34.

> the room. One day last spring, a student had a terrifying flashback when a prop for the senior prom crashed to the gymnasium floor. [¶] All of the students held hostage by [the child killer] now have graduated. Still, for some, the tears continue.[68]

The day after the murder of two teenagers in a New York high school, more than 400 students asked for a transfer, attendance was down 50 percent, classes were replaced with counseling sessions, and school rooms became grieving rooms.[69]

Death does not affect only our children. The mother of a 15-year-old boy who gunned down two teenagers at a New York high school is afraid to walk outside her home alone for fear she will be killed by the victims' avengers.[70] The mother of one of the victims moved out of her housing project.[71] The mother of another student lamented, "You sit at home and you wonder if your kid will come home alive or not."[72] A teacher, shortly after a student was gunned down in a Los Angeles high school, penned this rap lyric:

> *School's a place for learnin'*
> *School's a place for fun*
> *And that sure ain't gonna happen*
> *If someone brings a gun.*[73]

Not only are the victims, witnesses and survivors traumatized by this mortal gunplay, the lives of the young perpetrators are forever altered. Ahead of them may lie death by retaliation,

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[68] *The Tragedy in Room 108, supra*, at 46.

[69] Edna Negron, *400 students want out of Jefferson HS*, Newsday, Feb. 28, 1992, at 2.

[70] Mary Tabor, *A Year Later, Death's Echoes*, New York Times, June 24, 1993, at B3.

[71] *Id.*

[72] *400 Students want out of Jefferson HS, supra.*

[73] Tracey Kaplan, *Fatal Shooting At School Prompts Project To Spread Anti-Weapons Message*, Los Angeles Times, June 5, 1993, at B4.

prison, or, worse yet, condonation of their inhuman barbarism.

It does not take a tragedy of the magnitude of a double homicide, however, to deprive America's youth of an education. The daily reality of chronic violent crime and the prevalence of guns paralyze our education system, through fear, distraction and despair.

The tragic fact is that our children are *afraid* to go to school. Nearly two decades ago, the Department of Health, Education and Welfare published – and reported to Congress – the Safe School Study.[74] The study showed that one-third of large-city junior high school pupils and nearly one-fifth of their counterparts in rural areas were afraid of three or more school-related locations, such as bathrooms and other places on school grounds. Nearly eight percent of large-city junior high school students stayed home due to fear at least one day in the preceding month.[75] As noted researchers concluded, "about 1.7 million junior and 2.0 million senior high youth [are] afflicted by moderate to high levels of fear."[76] About 11 percent of them are afraid *on the way to school* at least once a week.[77]

As the number of guns and frequency of gun-related violence has proliferated through the years, so has our children's degree of fear. In a national survey, 15 percent of inner-city high school students said they were scared at school almost all of the time.[78] Sixteen percent of eighth graders, 14 percent of tenth graders and 12 percent of twelfth

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[74] U.S. Dept. of Health, Educ. & Welfare, *Violent Schools – Safe Schools: the Safe School Study Report to Congress*, Vol. 1, Washington, D.C.; U.S. Government Printing Office (1978). *See* Ivor Wayne & Robert J. Rubel, *Student Fear in Secondary Schools*, The Urban Review 198-199 (1982).

[75] *Id.*

[76] Wayne & Rubel, *supra*, at 203.

[77] *Id.* at 219.

[78] Sheley, *et al.*, *Gun Related Violence In and Around Inner-City Schools*, 196 American Journal of Diseases of Children, 677-682 (1992).

graders told University of Michigan researchers that they fear for their safety.[79]

The fear is even more pervasive in some cities. A study of 1,250 Philadelphia families with a 12-year-old boy found that nearly half the boys were afraid of their immediate area.[80] The researchers reported:

> School-related settings were of considerable concern to many boys; about one-quarter found the school building itself (halls and rooms) dangerous, and about half were fearful of streets leading to and from school, and the school yard.[81]

This fear keeps children out of school. According to the Justice Department, each day 160,000 kids stay away from school because they are afraid to go.[82] Nearly eight percent of urban junior and senior high school students missed at least one day of school a month because they were afraid to go to school.[83] A study of Illinois high school students found that one in 12 confessed to staying away from school out of fear.[84]

Violence also interferes with the teacher's ability to maintain an environment conducive to learning. Twelve percent of secondary school teachers across our country – and 28 percent of secondary school teachers in the largest cities – admitted that they had hesitated to confront misbehaving students in the preceding month because they were afraid of retaliation.[85]

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[79] *When Killers Come to Class, supra*, at 32.

[80] Study by Michael Lalli & Leonard Savitz, discussed in Wayne & Rubel, *supra.*

[81] *Id.*, quoting from Leonard Savitz, *Intergenerational Patterns of Fear and Crime, Interim Report to the Office of Juvenile Justice and Delinquency Prevention*, U.S. Department of Justice (1976).

[82] *Id.*

[83] National School Safety Center, *Safe Schools Overview, NSSC Resource Paper*, 3 (Feb. 1986).

[84] *Kids Who Kill, supra.*

[85] Jackson Toby, *supra.*

2. Effect Of Guns And Violence On The Classroom And Learning Opportunities.

Violence-inspired fear not only keeps our children out of class and interferes with their teacher's ability to teach, it interferes with the ability of those who *stay* in class to learn. It is beyond dispute that "[e]xposure to violence adversely affects children's development in many areas, including their ability to function in school, emotional stability, and orientation toward the future."[86]

The effect of school violence on the ability of children to learn in the classroom has been known for decades. A 1972 study reported:

> The perception of the school environment of being dangerous could very well influence the students' ability to do well in school. A student who feels that he is in danger of being beaten up or robbed in the schoolroom is not likely to pay full attention to the teacher. Also, the perception of the school yard and halls as dangerous may account somewhat for the high truancy rates which are recorded by the inner-city schools.[87]

Indeed, a 1976 study of the criminal victimization of public school students in Dade County, Florida, found that "about one-fifth of the responding secondary school students said that their ability to learn in class was affected by their fear of other students."[88] The Safe School Study confirmed these results as a national phenomenon. Students who were highly apprehensive of their school for safety reasons were considerably more likely to have below-average grades (D's and F's)

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[86] *Silent Victims, Children Who Witness Violence*, 269 JAMA 2 (1993).

[87] Wayne & Rubel, *supra*, at 199, quoting M. Lalli & L. Savitz, *Delinquency and City Life, Washington, D.C.*; National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, (1972).

[88] Wayne & Rubel, *supra*, at 199.

than higher grades.[89] Very apprehensive students rated themselves much lower than others in reading ability.[90]

Furthermore, violence affects our children's representations of the world. A child exposed to chronic violence may develop pathogenic conclusions such as, "the world is a hostile and dangerous place," "kill or be killed," and "my enemies are less than human."[91] They may develop the symptoms of Post-Traumatic Stress Disorder, including "sleep disturbances, day dreaming, recreating trauma in play, extreme startle responses, emotional numbing, diminished expectations for the future, and even biochemical changes in their brains that impair social and academic behavior."[92] As Dr. James Garbarino, President of the Erikson Institute for Advanced Study in Child Development, has concluded based on years of study and review of pertinent research:

> This trauma can produce significant psychological problems that interfere with learning and appropriate social behavior in school and that interfere with normal parent-child relationships. . . . ***If these children do not develop a sense of confidence that adults are committed to providing a safe zone in the school their willingness and ability to take advantage of educational opportunities will decrease and this will adversely effect their future contributions to the nation's economic life in positive terms***.

See Declaration of James Garbarino, Appendix A hereto, at App. 11 (emphasis added).

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[89] *Id.* at 204.

[90] *Id.*

[91] Declaration of James Garbarino, Appendix A hereto, at App. 10.

[92] *Id.*

Recent research finds an association between children's witnessing community violence and subsequent development of emotional disturbances.[93]

C. REVERBERATIONS OF VIOLENCE: THE NATIONAL IMPLICATIONS OF GUN POSSESSION AND GUN-RELATED VIOLENCE IN SCHOOLS.

The costs of treating gunshot wounds, the effect of gun violence on education, and the use of our schools as the new marketplace for the gun trade have serious interstate consequences.

1. The Quality Of Education Has A Direct Relationship To Our Country's Economic Competitiveness.

It is well established that education is the key to our nation's economic development. Researchers reported to The World Bank in 1990:

> There is now a persuasive body of theoretical and empirical evidence that investment in the formal education and training of the labor force plays a crucial role in economic development . . . [¶] The results of these studies suggest that in both developed and developing countries, educational investment has been one of the most important factors contributing to economic growth . . . .[94]

Historically, education has been critical to our national economy. Nearly a quarter of America's increase in economic growth between 1929 and 1957 was due to the increased

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[93] L.N. Freeman, *et al.*, *Violent Events Reported By Normal School-Aged Children: Characteristics and Depression Correlates.* 32 J. Am. Acad. Child Adolescent Psychiatry 419-23 (1993).

[94] Wadi D. Haddad, et al., *Education and Development: Evidence for New Priorities,* World Bank Discussion Papers, 3 (1990).

education of its labor force.[95] Education contributed to 11 percent of economic growth in the United States between 1948 and 1973.[96] It is a plain fact that schooling makes more productive workers.[97]

The quality of education also has a direct effect on the ability of the individual to compete economically in our society. The more education, the less likely one will be unemployed. In 1989, people who did not finish high school were over four times more likely to be unemployed than college graduates.[98] Furthermore, the more education, the higher the income. In the 1980s, college graduates saw their real incomes rise by 10 percent; high school graduates and high school dropouts saw their real incomes drop by about 10 percent.[99]

These statistics are not surprising. Better quality education develops personal attributes that are useful in the job market or conducive to greater interest in continuing schooling.[100] The benefits of education – and the necessity of education – become even more important as we increase our reliance on automation and information technology, rather than manual labor or low-skilled jobs.[101] A skilled labor force

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[95] Lewis C. Solomon, *The Quality of Education and Economic Growth: A Review of the Literature*, in The Quality of Education and Economic Development (Stephen P. Heyneman & Daphne Siev White eds. 1986) 12-13.

[96] Dale Jorgenson, *The Contribution of Education to U.S. Economic Growth, 1948-73*, in Education and Economic Productivity, (Edwin Dean, ed., 1984).

[97] Christopher Coldough, *Primary Schooling and Economic Development: A Review of the Evidence*, World Bank Staff Working Paper NO. 399 (1980).

[98] *Trying Harder*, The Economist: A Survey of Education, Nov. 21, 1992, at 4.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 5.

is a national resource directly affecting the shape of our labor markets and the nation's competitive productivity.[102]

2. The Quality Of One State's Educational System Affects The Welfare Of Other States Due To The Mobility Of Youth.

The education of our children is not limited to any particular state. Between two and four percent of children below the age of 18 – over a million boys and girls – moved to a different state in a single year.[103] There is a substantial federal interest in the education of the many millions of children whose schooling is not limited to a single state.

Furthermore, the presence of guns in schools has a direct and highly restrictive effect upon interstate travel. Violence in schools discourages travel to urban areas where school violence is particularly high. Parents do not want their children to go to dangerous schools, and gun violence thus obstructs interstate commerce, because one cannot move and not go to school. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 300, 85 S.Ct. 348 (1964).

3. The Medical Costs Of Gun-Related Violence In Schools, Borne Largely By The Federal Government And Taxpayers, Have Interstate Consequences.

It is difficult to estimate the medical costs associated with gun-related violence in schools due to the relative dearth of pertinent statistics and the concurrence of skyrocketing

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[102] The sheer increase in the volume of guns in our schools and the social circumstances of our time cause gun possession to have a far larger impact on the national economy than it would have had on an economy of another day. *Cf. Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 251, 85 S.Ct. 348 (1964).

[103] Kristin A. Hansen, Bureau of the Census, *Geographical Mobility: March 1991 to March 1992*, Table 1, p.7, *in Current Population Reports: Population Characteristics*, 20-473 (1993).

health care costs and stunning increases in the frequency and severity of violent incidents. In 1986, hospitalization costs (not including ambulance services, physicians fees, readmissions, ambulatory care follow-up visits, physical therapy, rehabilitation services, and long-term care) were estimated to be about $7,000 per gunshot patient.[104] In 1990, hospitalization costs rose to nearly $15,000 per gunshot patient.[105] Most recently it was estimated that "every gun injury amounts to more than $33,000 in medical costs – exclusive of doctor's fees."[106]

This expense is a national concern, affecting each of the 50 states. Approximately 86 percent of hospitalization costs are borne by *public* funds, including Medi-Cal (Medicaid), Medicare, the Medically Indigent Adult Program, the jail system, the Aid to Victims & Witnesses Program, and bad debts written off by the hospital.[107]

Most of the balance of hospitalization costs (about 13 percent) are borne by private insurance companies, workers' compensation insurance providers, and health maintenance organizations, which are largely interstate concerns.[108] *See United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991) (possession of firearms adversely affects the national economy, at least through interstate insurance companies). Patients themselves pay only 1.4 percent of the costs.[109]

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[104] *The Cost of Hospitalization for Firearm Injuries*, 260 JAMA 3048-3050 (1988).

[105] This figure is based on the mean cost for hospital care, excluding physician fees, for a patient with a gunshot wound in Washington, D.C., including both adults and children, between July 1, 1989, and June 30, 1990. *See Epidemiologic Changes in Gunshot Wounds in Washington DC, 1983-1990*, 127 Archives of Surgery 694-98 (1992).

[106] Donna Harrington-Lueker, *The American School Board Journal*, 24 (May 1992) (quoting Deane Calhoun of Teens on Target in Oakland, California).

[107] *The Cost of Hospitalization for Firearm Injuries, supra.*

[108] *Id.*

[109] *Id.*

Hospitalization costs, however, are only a small portion of the total medical costs. The fees of doctors and other professionals will also be borne largely by public funds and private insurance companies. The recent escalation of violence has placed substantial financial strain on urban trauma centers, forcing some of them to close.[110]

4. The Flow Of Guns Through Interstate Trade And Multistate Gang Activities Affects Interstate Commerce.

The guns that are possessed and sold in and near our schools have likely crossed state lines. In New York City, one out of every four guns that could be traced was bought in Virginia; one in three traceable guns in Washington, D.C. was also bought in Virginia.[111] "In cities with strong gun-control laws, like Boston, New York and Washington, weapons are imported and resold at a profit by traffickers who purchase them in states that until recently have had few gun-buying restrictions: Florida, Texas, Virginia, Georgia and Ohio."[112]

Four California firearms manufacturers provided 40 percent of the handguns seized by Denver police from gang members in 1993.[113] A study by the Bureau of Alcohol, Tobacco and Firearms and police in Detroit, Michigan, found that the most frequently used gun in serious crimes in Detroit was manufactured in California.[114] According to the Violence Policy Center, a gun-control advocacy group in Washington, D.C., those California guns are the favorites of gun traffickers

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[110] *Epidemiologic Changes in Gunshot Wounds in Washington DC, 1983-1990, supra,* citing United States General Accounting Office, *Trauma Care: Lifesaving System Threatened by Unreimbursed Costs and Other Factors* (1991).

[111] Lorraine Woellert, *Gotham's guns come from Virginia,* The Washington Times, Dec. 30, 1992, at A1.

[112] *Kids Who Kill, supra,* at 28.

[113] John C. Ensslin, *Denver's Gang Arsenal,* Rocky Mountain News, March 13, 1994, at F20A.

[114] *Id.* at F22A.

D.C., those California guns are the favorites of gun traffickers and youth.[115]

Indeed, the interstate activity of gangs has apparently fueled interstate transportation of guns. Gangs, and their guns, have spread across state borders. "The Crips and the Bloods began in Southern California about 20 years ago but now have loose affiliations in 32 states and 113 cities."[116]

Because guns are carried across state lines, additional measures should be taken at the federal level to curb the availability of firearms due to the current variation among states in firearm regulations.[117]

IV. CONCLUSION

The facts cataloged in this brief confirm that the possession of guns in and near our schools – unlike other local crime or the possession of "lead pencils, 'sneakers', Game Boys or slide rules" (*see Lopez*, 3 F.3d at 1366) – has deadly consequences and a definite effect on the commerce among the states. Absent the constraint on the page limitations for this brief, *amici* could provide ten times the amount of information herein.

The Gun-Free School Zones Act, though not a panacea, is a proper method for Congress to use to help eradicate the violence, and the threat of violence, that is directly affecting

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[115] *Id.*

[116] *Id.*

[117] *See Firearm Violence and Public Health: Limiting the Availability of Guns*, 271 JAMA 1281-1283 (1994).

each of the 50 states and our national economy. We respectfully urge this Court to reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF JAMES GARBARINO, Ph.D.

1. CREDENTIALS AND EXPERIENCE

I, James Garbarino, Ph.D., have been President of the Erickson Institute for Advanced Study in Child Development since 1985. I earned my B.A. from St. Lawrence University in 1968, and my Ph.D. in Human Development and Family Studies from Cornell University in 1973. I have served as a consultant to a wide range of organizations including the National Committee for the Prevention of Child Abuse, the National Institute for Mental Health, the American Medical Association, the National Black Child Development Institute, the National Science Foundation, the National Resource Center for Children in Poverty, and the U.S. Advisory Board on Child Abuse and Neglect. In 1991 I undertook missions for UNICEF to assess the impact of the Gulf War upon children in Kuwait and Iraq, and have served as a consultant for programs serving Bosnian and Croatian children.

I have been a consultant to television, magazine, and newspaper reports on children and families. I have also authored several books dealing with the impact of violence on children, including: *Protecting Children from Abuse and Neglect* (1980); *Children and Families in the Social Environment* (2d ed. 1992); *Troubled Youth, Troubled Families* (1986), *No Place to be a Child: Growing Up in a War Zone* (1991); *Children in Danger: Coping with the Consequences of Community Violence* (1992).

I have received numerous awards, including the Society for Psychological Study of Social Issues Prize for

Research on Child Abuse (1992); The Brandt F. Steele Award from the Kempe National Center on Child Abuse and Neglect (1993); and the Nicholas Hobbs Award from the American Psychological Association's Child, Youth and Family Services Division (1994).

2. OVERVIEW

Based upon my research during the past 9 years in the United States and abroad involving observations of children coping with violence and the threat of violence, it is my opinion that there is a compelling national interest involved in the Gun-Free School Zones Act that affects children and life in each of the fifty states, and that affects the commerce of the United States in terms of educational, health and economic issues, among others. The current presence of guns in the social environment of schools exerts a clear and present danger to the psychological well-being of students and teachers. It diverts attention and resources away from the educational process. It increases the likelihood of trauma-inducing violence. It engenders and reinforces a climate of fear among students and teachers that generates coping responses that themselves can undermine the educational process (*e.g.*, truancy caused by fear of violence, high teacher turnover due to fear and trauma, and restricted use of school facilities due to the exigencies of security measures).

Data on the prevalence of assault in American schools documents the fact that it is common (Simmons and Blyth, 1990). The introduction of guns into the school environment transforms this "traditional" challenge to

children and youth into a much more intense threat, one that can quickly become lethal. Based upon my research and the research of my colleagues, I believe that banning the possession of guns in the immediate vicinity of schools is one necessary element in a "safe schools" campaign that can help restore a social climate more conducive to learning and teaching. This effort will contribute to economic, social, and physical well-being of the citizens of the United States.

3. BACKGROUND AND ANALYSIS

Hundreds of thousands of American children face the challenge of living with chronic community violence, and most American children must cope with increased fear of violence as they go about their daily lives. Homicide rates provide only a rough indicator of the overall problem of violence in the lives of American children and youth. The United States Surgeon General's report in 1985 (Koop, 1985) estimated 100 assaults for each murder. However, this ratio varies as a function of both medical trauma technology (which prevents assaults from becoming homicides) and weapons technology (which can increase or decrease the lethality of assaults). Two examples from Chicago illustrate these issues.

The city's homicide rate in 1973 and 1993 was approximately the same, and yet the rate of serious assault increased approximately 400% during that period. Thus, the ratio of assaults to homicides increased substantially. A second example is to be found in data from Chicago's Cook County Hospital. In 1982, the hospital responded to approximately 500 gun shot cases. In 1992,

the number was approximately 1,000. However, in 1982 almost all these cases involved single bullet injuries, while in 1992, 25% involved multiple bullets. Rates of permanent disability have thus increased substantially, although the homicide rate has shown only a modest increase.

Class, race, and gender exert important influences on exposure to community violence. The odds of being a homicide victim range from 1:21 for Black males, to 1:369 for white females (with white males at 1:131, and Black females at 1:104) (Bell, 1987). Being an American itself is a risk factor. The United States far exceeds all other modern industrialized nations in its homicide rate (even for whites, where the rate of 11.2 per 100,000 is far more than the second place country, Scotland, with 5 per 100,000 (Richters and Martinez, 1993).

Whatever the exact constellation of causes, children growing up in the United States have particularly high levels of exposure to violence. For example, in three high risk neighborhoods in Chicago, 17% of the elementary school age children had witnessed domestic violence, 31% had seen someone shot, and 84% had seen someone "beat up" (Bell, 1987). Thirty percent of the kids living in high crime neighborhoods of the cities like Chicago have witnessed a homicide by the time they are fifteen years old, and more than 70% have witnessed a serious assault. These figures are much more like the experience of kids in the war zones I have visited in other countries than they are of what we should expect for our own children, living in "peace." Richters and his colleagues (1993) have amplified these results. In their study, 43% of the 5th and

6th graders had witnessed a mugging in a moderately violent neighborhood in Washington, D.C.

In our interviews with families living in public housing projects in Chicago we learned that virtually all the children had first-hand experiences with shooting by the time they were five years old. Interviews with school-age children confirm that the "gun culture" is a potent factor in the life of children in diverse settings in the United States (Garbarino, in press). The spread of the "gun culture" into the lives of school children is associated with a clear and present danger to their mental health, social behavior, and educational success. I base this conclusion upon an analysis of the role of trauma, threat, and violence on the development of children (Garbarino, Dubrow, Kostelny, and Pardo, 1992).

The following examples describe the effects of this gun culture on the culture of childhood. In Detroit, a young boy whose idolized teenage brother was killed in a gang-related attack was asked, "If you could have anything in the whole world, what would it be?" His answer: "A gun so I could blow away the person that killed my brother." In California, when I asked a nine year old boy "what would it take to make you feel safer here?" he replied, "If I had a gun of my own." In a middle class suburb of Chicago, when I asked a classroom of eight year olds, "If you needed a gun could you get one?" a third of the children were able to describe in detail how they would get one. In a prison in North Carolina, when I asked three incarcerated teenagers why they had done the shooting that had landed them in prison, all three replied, "what else was I supposed to do?" We must understand that the gun culture is infusing the minds and

hearts of American children and youth. Whether or not this cultural infusion results in actual shooting depends upon the particular circumstances of those children and youth, specifically, whether they experience an accumulation of social and psychological risk factors.

One of the conclusions we draw from our observations of children coping with chronic community violence in today's America is that risk accumulates. Children are capable of coping with one or two major risk factors in their lives. But when risk accumulates – the addition of a third, fourth, and fifth risk factor – we see a precipitation of developmental damage. This developmental model is particularly relevant to understanding the impact of chronic community violence on inner city children.

The experience of community violence takes place within a larger context of risk for these children. They are already often poor, often live in father-absent families, often contend with parental incapacity due to depression or substance abuse, often are raised by parents with little education or employment prospects, and often are exposed to domestic violence.

This constellation of risk by itself creates enormous challenges for young children. For them, the trauma of community violence is often literally "the straw that breaks the camel's back." Bearing in mind that approximately 20% of American children live with this sort of accumulation of risk, the problem of violence is clearly a national problem with far reaching implications for our educational system.

The task of dealing with the effects of this environmental conspiracy falls to the people who care for these

children – their parents and other relatives, teachers, and counselors. But these adults take on this task facing enormous challenges of their own. We have found that human service professionals and educators working in the high violence areas of our communities are themselves traumatized by their exposure to violence. In one study we found that 60% of the Head Start staff members surveyed in Chicago had experienced traumatic events connected with violence. For these individuals, efforts to create a "safe zone" in the school are crucial to their ability to perform their important functions in the lives of high risk children. For this safe zone to help children focus on their school work, it must exist as part of their "social maps."

Certainly one of the most important features of child development is the child's emerging capacity to form and maintain "social maps." These representations of the world reflect the simple cognitive competence of the child (knowing the world in the scientific sense of objective, empirical fact). But they also indicate the child's moral and affective inclination.

We are concerned with the conclusions about the world contained in the child's social maps: "adults are to be trusted because they know what they are doing," "people will generally treat you well and meet your needs," "strangers are dangerous," "school is a safe place." The forces shaping these maps include the child's experiences in counterpoint with the child's inner life – both the cognitive competence and the working of unconscious forces.

Young children must contend with dangers that derive from two sources not nearly so relevant to adults.

First, their physical immaturity places them at risk for injury from trauma that would not hurt adults because they are larger and more powerful. Second, young children tend to believe in the reality of threats from what most adults would define as "the fantasy" world. This increases their vulnerability to perceiving themselves as being "in danger." These dangers include monsters under the bed, wolves in the basement, and invisible creatures that lurk in the dark corners of bedrooms.

Trauma arises when the child cannot give meaning to dangerous experiences. This orientation is contained in the American Psychiatric Association's definition of Post Traumatic Stress Disorder (PTSD), which refers to threatening experiences outside the realm of normal experience. This suggests experiences which are cognitively overwhelming in which the process required to "understand" these experiences has pathogenic side effects. That is, in coping with traumatic events, the child is forced into patterns of behavior, thought, and feelings that are themselves "abnormal" when contrasted with that of the un-traumatized healthy child. Children are particularly vulnerable to the trauma caused by threat and fear – those exposed to trauma before age 10 were three times more likely to exhibit PTSD than those exposed after age 12 in one study (Davidson & Smith, 1990).

> Children and youth exposed to acute danger may require processing over a period of months (Pynoos and Nadar, 1988). And, if the traumatic stress is intense enough, it may leave permanent "psychic scars" (Terr, 1990). This is particularly the case for children made vulnerable because of disruptions in their primary relationships (most notably with parents). These

> effects include excessive sensitivity to stimuli associated with the trauma and diminished expectations for the future (Terr, 1990).
>
> But chronic danger imposes a requirement for *developmental* adjustment – *accommodations*. These are likely to include persistent Post Traumatic Stress Syndrome, alterations of personality, and major changes in patterns of behavior or articulation of ideological interpretations of the world that provide a framework for making sense of on going danger (Garbarino, Dubrow, Kostelny, and Pardo, 1992). This is particularly true when that danger comes from violent overthrow of day-to-day social reality, as is the case in war, communal violence, or chronic violent crime.

Adults are crucial resources for children attempting to cope with chronic danger and stress. Generations of studies focusing on the experience of children living in war zones testify to the importance of adult responses to danger as mediating factors in child response (Garbarino, Kostelny, and Dubrow, 1991). So long as adults take charge of themselves and present children with a role model of calm, positive determination, most children can cope with a great deal of chronic stress associated with community violence. They may indeed be traumatized by their experiences, but the adults around them will be able to serve as a resource and support the child in rehabilitative efforts.

However, once adults begin to deteriorate, to decompensate, to panic, children suffer. This is not surprising, given the importance of the images of adults contained in the child's social maps. Traumatized children need help

to recover from their experiences (Terr, 1990). Emotionally disabled or immobilized adults are unlikely to offer the children what they need. Such adults are inclined to engage in denial, to be emotionally inaccessible, and are prone to misinterpret the child's signals. Messages of safety are particularly important in establishing adults as sources of protection and authority for children living in conditions of threat and violence.

In Vygotsky's approach (1986), child development is fundamentally *social*: cognitive development proceeds at its best through the process of interactive teaching. He focuses on the Zone of Proximal Development: the difference between what the child can accomplish alone versus what the child can accomplish with the guidance of the teacher. How is this relevant to the child's ability to cope with trauma?

In the case of acute trauma (a single horrible incident that violates the normal reality of the child's world) the child needs help believing that "things are back to normal." This is a relatively easy teaching task, this therapy of reassurance. But the child who lives with chronic trauma (e.g., the problem of community violence) needs something more. This child needs to be taught how to redefine the world in moral and structural terms.

The child needs assistance in "processing" the existing world if that child is to avoid drawing social and/or psychologically pathogenic conclusions: "the world is a hostile and dangerous place," "adults have lost control of the world," "kill or be killed," "don't trust anyone," "my enemies are less than human." Here the role of the adult as teacher is crucial for the well being of the child and for

well being of the community in which that child is to be a citizen.

Many inner city children are experiencing the symptoms of Post-Traumatic Stress Disorder, symptoms which include sleep disturbances, day dreaming, recreating trauma in play, extreme startle responses, emotional numbing, diminished expectations for the future, and even biochemical changes in their brains that impair social and academic behavior. This trauma can produce significant psychological problems that interfere with learning and appropriate social behavior in school and that interfere with normal parent-child relationships.

Trauma and its consequences can also make them prime candidates for involvement in gangs, where the violent economy of the illicit drug trade offers a sense of belonging and solidarity as well as cash income for kids who have few pro-social alternatives for either. If these children do not develop a sense of confidence that adults are committed to providing a safe zone in the school their willingness and ability to take advantage of educational opportunities will decrease and this will adversely affect their future contributions to the nation's economic life in positive terms.

Based upon my work in the field and my understanding of the research and clinical experience of my colleagues, I have reached the conclusion that there are many similarities between the experiences of children growing up in war zones around the world and American children growing up amidst chronic community violence. These similarities hit home for me particularly in comparing the situation of children in refugee camps I have

visited in Thailand, Hong Kong, and the Middle East, and public housing projects in Chicago and other cities.

* In both the camps and the projects, there is a proliferation of weapons – a kind of "arms race" – which exacerbates the effects of conflict and violence. It is common for young people – particularly males – to be heavily armed and to be engaged in armed attacks and reprisals. Substantial numbers of "bystander" injuries are observed.

* In both the camps and the projects, representatives of "mainstream" society have only partial control over what happens. The international relief workers leave the camps at the end of the working day, and so do the social workers and educators in the public housing projects. Both the camps and the projects are under the control of the local gangs at night. Therefore, no action during the day can succeed unless it is acceptable to the gangs that rule the community at night. For example, there have been cases in public housing projects in Chicago in which local gangs have established curfews on their own initiative and in which gangs make the decision about whether or not someone who commits a crime against residents will be identified and punished.

* In both the camps and the projects, women – particularly mothers – are in a desperate situation. They are under enormous stress, often are the target of domestic violence, and have few economic or educational resources and prospects. Men play a marginal role in the enduring life of families – being absent for reasons that include participating in the fighting, fleeing to escape enemies, being injured or killed, and (particularly in the

case of the American public housing project), being imprisoned. Largely as a result, there is a major problem of maternal depression. Studies in both settings have reported 50% of the women being seriously depressed.

* In both the camps and the projects, one consequence of maternal depression is neglect of children. This connection is well established in research. This neglect leads to elevated levels of "accidental injuries" to children.

* In both the camps and the projects, children and youth have diminished prospects for the future. This lack of a positive future orientation produces depression, rage, and disregard for human life – their own and others.

One focus of international initiatives (such as the United Nations Convention on the Rights of the Child) is to create "zones of peace" for children, and generally to encourage combatants to institute and respect protected areas for children. Violence free zones in and around schools are a logical parallel relevant to the United States.

International action does bring change for families living in refugee camps, however. For example, the signing of a peace accord has meant that repatriation has come to the Khmer, and they are returning to Cambodia to take up a more genuine community life. However, without some comparable national effort in the United States to achieve reconciliation, social justice, and a major peacekeeping force in our cities, most of the families in America's urban war zones will remain there, and another generation of children will experience the trauma of chronic community violence. Therein lies one major

difference for children living in the world's refugee camps and children living in many of America's public housing projects. In war zones, there is hope of peace, repatriation, and the renewal of community life. In the case of community violence in America, the war never ends, peace never comes. In this demoralizing context the creation of school-based "gun free zones" is an important step with symbolic as well as practical implications for American children.

Our efforts to understand the impact of chronic community violence on children and youth around the world and in our own cities highlights several concerns – unmet medical needs, the corrosive effects of the co-experiencing of poverty and violence on personality and on academic achievement, etc. *But from my perspective, the most important of these is that the experience of trauma distorts the values of kids.* Unless we reach them with healing experiences and offer them a moral and political framework within which to process their experiences, *traumatized kids are likely to be drawn to groups and ideologies that legitimatize and reward their rage, their fear, and their hateful cynicism.* This is an environment in which gangs flourish and community institutions deteriorate.

4. CONCLUSION

Our work studying children exposed to chronic community violence from a comparative perspective and reviewing the research of others leads us to a series of themes. These themes help to explain why prohibition of guns within and in the immediate vicinity of schools is an essential element of a national agenda to reduce the level

of violence currently affecting children. The developmental and educational consequences of the growing gun culture among children and youth represent a clear and present danger to the United States and its citizens.

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I declare under penalty of perjury under the laws of the United States of America and the State of Illinois that the foregoing is true and correct of my personal knowledge and that this declaration is executed this 1st day of June, 1994, at Chicago, Illinois.

/s/
James Garbarino

No. 93-1260

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IN THE
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OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF 16 MEMBERS OF THE UNITED STATES SENATE AND 34 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER †

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1260

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF 16 MEMBERS OF THE UNITED STATES SENATE AND 34 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are a bipartisan group of 16 members of the United States Senate and 34 members of the United States House of Representatives.[2] *Amici* have dual interests in this Court's review of the Court of Appeals' decision in *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3690 (1994). First, they have an institutional interest in the procedural requirements for enacting constitutionally sound legislation. They ada-

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[1] Both petitioner and respondent have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

[2] Individual *amici* are listed on the inside cover of this brief.

mantly disagree with the Fifth Circuit's suggestion that Congress must make specific findings that legislation affects interstate commerce before Congress can exercise its power under the Commerce Clause of the United States Constitution.

Second, *amici* have a substantive interest here because the *Lopez* decision threatens Congress's ability to respond effectively to violent crime and the proliferation of illegal firearms. Over the past few years, Congress and the President have made crime prevention and punishment a first-order priority of the federal government. The *Lopez* decision suggests, however, that there are severe constitutional limits on the federal government's ability to enact legislation that addresses the national problems of crime and deadly weapons. The ramifications of the *Lopez* decision stretch far beyond the Gun-Free School Zones Act ("the Act"), held unconstitutional in *Lopez*, potentially affecting a wide range of federal crime control measures.

If the decision in *Lopez* were to stand, Congress will face significant burdens every time it enacts legislation—burdens simply not imposed by the Constitution. Indeed, the *Lopez* decision may seriously undermine the omnibus anticrime bill (H.R. 3355) now pending before a House-Senate conference committee. Ultimately, *Lopez* would prevent Congress from comprehensively addressing crime, an issue that clearly and substantially affects interstate commerce—and the national interest.

The U.S. Court of Appeals for the Ninth Circuit has held that the Act "represents a permissible exercise of Congressional authority under the Commerce Clause." *United States v. Edwards*, 13 F.3d 291, 292 (9th Cir. 1993).[3] *Amici* fully agree. With the United States, accord-

[3] The Ninth Circuit's analysis has been followed in *United States v. Glover*, 842 F. Supp. 1327 (D. Kan. 1994), and *United States v. Ornelas*, 841 F. Supp. 1087 (D. Colo. 1994). Another district court reached the same conclusion shortly before the Ninth Circuit released its decision in *Edwards*. *See United States v. Holland*, 841 F. Supp. 143 (E.D. Pa. 1993).

ingly, they ask this Court to reverse the Fifth Circuit's decision in *Lopez*.

SUMMARY OF ARGUMENT

Congress enacted the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), to respond to the growing scourge of violence in the high schools and even the grade schools of this country. The law prohibits the possession of firearms within 1,000 feet of a school. As the U.S. Court of Appeals for the Ninth Circuit correctly held, Congress had the authority to pass the legislation, under the broad mandate of the Commerce Clause, without colliding with the Tenth Amendment's reservation of rights to the states.

The court below fundamentally erred. It held the Act unconstitutional—in part because Congress had failed to make specific findings of fact to establish a relationship between interstate commerce and armed violence in the schools, and in part because Congress failed to state that it was exercising its powers pursuant to the Commerce Clause. Yet Congress has regulated interstate commerce in weapons, with and without specific findings, since at least 1934 when it prohibited the possession of unregistered sawed-off shotguns and machine guns. There long has been federal legislation regulating the transportation, possession and use of firearms—to the point, indeed, that this Court has sanctioned a federal law that regulates the redemption of firearms from local pawnshops because of its impact on interstate commerce. Neither the Commerce Clause nor the decisions of this Court, moreover, require Congress expressly to invoke that Clause or to find, as fact, each time that it legislates that a particular bill implicates interstate commerce. Rather, the only appropriate question is whether Congress could have found that the actions proscribed by Section 922(q) substantially affect commerce "among the several States." The obvious answer is "yes."

There is overwhelming evidence that the interstate traffic in guns by criminals contributes directly to the national problems of drugs and violence that, in turn, now threaten this country's commitment to elementary and secondary education. Thirty years ago, without the benefit of congressional findings, this Court acknowledged the "burdens that discrimination by race" place on interstate commerce and rejected a Commerce Clause challenge to Title II of the Civil Rights Act of 1964. Today, no less, armed conflict in the schools is not merely a "local" problem that Congress may decry but is powerless to address. While the courts ultimately determine whether activity regulated by Congress comes within the reach of the commerce power, *United States v. Darby,* 312 U.S. 100 (1941), the Fifth Circuit either ignored or seriously misapprehended this Court's precedent. The court below redefined the "rational basis" standard under which this Court traditionally has upheld statutes resting on the Commerce Clause and imposed novel fact-finding burdens on Congress that dramatically change the institutional relationship between Congress and the federal courts. This Court should reverse the decision below and uphold the constitutionality of the Gun-Free School Zones Act.

ARGUMENT

The U.S. Department of Justice has just reported that people armed with handguns committed a record 930,700 violent crimes in 1992. *See* Bill McAllister, *Handgun Crime Up Sharply,* Wash. Post, May 16, 1994, at A1. The problem of gun violence is particularly prevalent among young people. *See generally Children Carrying Weapons: Why the Recent Increase: Hearing Before the Senate Committee on the Judiciary,* 102d Cong., 2d Sess. (1992). Disturbingly, though perhaps not surprisingly, gun possession has spread into the schools.

According to the National Education Association, more than 100,000 students carry guns to school every day. *See id.* at 6 (statement of Sen. Kohl); Elizabeth Birge, *5 Year-Old Fires Gun at School,* Chi. Trib., Jan. 9, 1994, Chicagoland sec. at 3. In 1987, more than a quarter of a million students carried a handgun to school at least once. *See Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcommittee on Crime of the House Committee on the Judiciary,* 101st Cong., 2d Sess. 7 (1990) (statement of Rep. Feighan). The problem is national, affecting urban, suburban and rural areas alike. *See Children and Gun Violence: Hearings on S. 1087 Before the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary,* 103d Cong., 1st Sess. 2 (1993) (statement of Sen. Kohl).

The prevalence of guns in schools is directly related to their accessibility. A 1992 study in the *Journal of the American Medical Association* found that 34 percent of Seattle's public high school students reported easy access to handguns, with 6.4 percent actually owning a handgun. These same students reported a high rate of firearm experiences: one in every three student gun owners admitted that they actually had fired a gun at someone, and six percent of all male students reported carrying a handgun to school. Charles M. Callahan and Frederick P. Rivara,

Urban High School Youth and Handguns: A School-based Survey, 267 J. Am. Med. Ass'n 3038 (June 10, 1992).

The proliferation of handguns has made firearm injuries among young people a national tragedy. Gun injuries are now one of the leading causes of death for young people. *Id.* In 1988, firearms accounted for 20 percent of all deaths among 15- to 24-year olds. *Id.* Over three fourths of adolescent homicides and slightly more than half of all adolescent suicides are firearm related—a majority of these, the result of handguns. *Id.*

The Gun-Free School Zones Act, 18 U.S.C. § 922(q), represents the first effort to address the growing crisis of guns in schools and the related problems of drugs and gang activity. Adopted in 1990 as part of the Crime Control Act, the law prohibits the possession of a firearm within 1,000 feet of the grounds of a school. But much preceded this first step. In numerous hearings held over the years on the escalating problem of violent crime across the nation, Congress consistently has found a direct link between firearms and interstate commerce.

I. CONGRESS NEED NOT MAKE PARTICULARIZED FINDINGS REGARDING THE EFFECT OF A STATUTE ON INTERSTATE COMMERCE IN ORDER TO EXERCISE LEGISLATIVE POWER UNDER THE COMMERCE CLAUSE.

A statute grounded on the Commerce Clause is constitutional if "Congress had a rational basis for finding that [the regulated activity] affected [interstate] commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). This Court has long held, moreover, that when legislating under the Commerce Clause, Congress need not make express, particularized findings. *See, e.g., Perez v. United States*, 402 U.S. 146, 156 (1971) ("We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so

not to infer that Congress need make particularized findings in order to legislate.") (emphasis added); *see also Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (noting, with respect to the civil rights statute at issue in *Heart of Atlanta Motel*, that "no formal findings were made, which of course are not necessary").

The demand by the court below for specific legislative findings conflicts with this Court's repeated declarations that the rational basis standard does not require Congress to make *any* findings to justify its actions. In equal protection cases, for example, the Court will uphold a legislative classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, —— U.S. ——, 113 S. Ct. 2096, 2101 (1993). For that reason, the Court "never require[s] a legislature to articulate its reasons for enacting a statute . . .," *id.* at 2102, and "the absence of 'legislative facts' explaining the distinction '[o]n the record,' . . . has no significance in rational-basis analysis." *Id.* Legislative judgments may simply "be based on rational speculation unsupported by evidence or empirical data." *Id.* The Court should accord no less deference in determining whether Congress had a rational basis for exercising its commerce power here.

Of course, if congressional findings are made, they carry great weight. *See United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981); *Katzenbach*, 379 U.S. at 304. Even the court below conceded that "[w]here Congress has made findings . . . that [the] regulated activity substantially affects interstate commerce, the courts must defer 'if there is any rational basis for' the finding." *Lopez*, 2 F.3d at 1363 (quoting *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990)).[4] The

[4] The court also observed that "[p]ractically speaking, such findings almost always end the matter," noting that no decision of this Court has set aside such a finding as without a rational basis in

court below erred, however, in concluding that courts may rely only on the legislative history of the particular statute in question to provide those findings. *Lopez*, 2 F.3d at 1359-60.

Rather, there is an indispensable corollary to the principle that Congress's findings carry great weight: courts may consider the history of other legislation regulating the same class of activities. Justice Powell explained this principle in *Fullilove v. Klutznick*, 448 U.S. 448 (1980): "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Id.* at 503. Moreover, the common-sense concept that earlier legislative findings can support subsequent enactments—and that Congress, therefore, need not revisit the same issues each time it legislates—avoids unnecessary expenditure of the legislature's time and hence the public's resources.

The Tenth Circuit followed this approach in *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990), a challenge to 18 U.S.C. § 245(b)(2)(c), which criminalized interference with applications for private employment because of race, color, religion, or national origin. The defendants argued that the statute had not been validly enacted pursuant to Congress's commerce power because there had been no legis-

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the last half century. *Id.* at 1363 n.43. Oddly, the *Lopez* court drew the inconsistent if not illogical conclusion that findings are *necessary* for judicial review.

In effect, the court below treated Congress's failure to make a finding that it has constitutional authority to enact a particular statute as tantamount to an affirmative finding that it lacks that authority. Such a rule could represent a serious encroachment on the role of the judiciary under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The final determination of the *power* of Congress—as opposed to its intent—to regulate under the Commerce Clause is a matter within the exclusive province of this Court.

lative findings regarding the effect of racial discrimination on interstate commerce. *Lane* at 1487, 1492. The court declared, however, that "Congress is not required to make 'particularized findings in order to legislate.'" *Id.* at 1492 (quoting *Perez*, 402 U.S. at 156). Although Congress had made no findings in 1988 when it enacted Section 245, it already had "heard extensive evidence on the burdens that racial discrimination places on interstate commerce in connection with its enactment of the Civil Rights Act of 1964." *Id.*; *see also United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992) (while Congress made no interstate commerce findings in 1986 when it enacted 18 U.S.C. § 922(o), regulating possession of machine guns, it made ample findings in 1968 on the nexus between firearms and interstate commerce), *cert. denied*, 113 S. Ct. 1614 (1993). Quite simply, the "rational basis" for a particular statute need not emanate from the legislative history of that statute.

Ignoring these principles, the court below suggested that *United States v. Bass*, 404 U.S. 336 (1971), stands for the proposition that Congress must clearly express its intent to legislate under the Commerce Clause by making interstate commerce findings in the particular statute at issue. *Lopez*, 2 F.3d at 1347, 1365 n.48. In *Bass*, the Court analyzed a federal law imposing penalties on a felon who "receives, possesses, or transports *in commerce or affecting commerce* . . . any firearm." *See* former 18 U.S.C. § 1202(a) (emphasis added). The defendant had been convicted for possession of firearms *without* proof that the possession took place in or affected commerce. The issue for the Court was a matter of statutory construction: does the language "in commerce or affecting commerce" modify "receives" and "possesses" as well as "transports." *Bass*, 404 U.S. at 339-42.

The Court found both the statutory language and the legislative history inadequate to determine congressional intent. *Id.* Accordingly, invoking the rule of lenity, the

Court read the provision narrowly to favor the defendant. It concluded that the defendant could be convicted only upon a specific showing of a nexus between his possession of a firearm and interstate commerce. *Id.* at 347.[5]

Unlike the statute at issue in *Bass*, however, Section 922(q) does not require proof of a factual nexus between the possession of a firearm in a school zone and interstate commerce as an element of the crime. *See United States v. Nelson*, 458 F.2d 556, 559 (5th Cir. 1972) (rejecting similar *Bass* challenge to Gun Control Act of 1968); *United States v. Lehman*, 464 F.2d 68, 73 n.11 (5th Cir.), *cert. denied*, 409 U.S. 950 (1972) (same); *United States v. Crandall*, 453 F.2d 1216 (1st Cir. 1972) (same). Nor is the language of Section 922(q) ambiguous. And, in any event, the Commerce Clause does not require that a criminal statute incorporate, as an element of the crime, a factual nexus between interstate commerce and the challenged conduct. *Huddleston v. United States*, 415 U.S. 814, 833 (1974).

The court below also required a specific legislative invocation of the Commerce Clause "to demonstrate that [Congress's] exercise of power is within the scope of the Commerce Clause." *Lopez*, 2 F.3d at 1365-66. This requirement, invented out of whole cloth, has no basis in the Constitution or in this Court's jurisprudence. Congress need not expressly invoke the Commerce Clause as the source of its power. *See EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) ("'The . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)); *see also supra* at 7 and n.4.

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[5] Moreover, the Court noted, Congress had in fact made findings in the legislation that would have supported the validity of a pure gun possession statute under the Commerce Clause. 404 U.S. at 346 n.14. These findings are discussed in further detail in Section II below.

In sum, where legislators have a rational basis for concluding that a chosen regulatory scheme is necessary to the protection of commerce, the Court's investigation is at an end. *See Katzenbach*, 379 U.S. at 303-05.[6] The Court's review is traditionally conducted in a highly deferential manner, *Hodel*, 452 U.S. at 276,[7] particularly when Congress has made findings that the regulated conduct substantially affects interstate commerce. *Preseault*, 494 U.S. at 17. Notwithstanding the *Lopez* court's assertion to the contrary, 2 F.3d at 1366, Congress repeatedly has made explicit findings on the many ways in which violent crime and illegal gun possession imperil the nation's economy and, by definition, affect interstate commerce. These findings form a legitimate, rational basis for the regulation at issue here.

II. THERE IS A STRONG FEDERAL INTEREST IN CRIME PREVENTION AND THE INTERSTATE TRAFFIC IN GUNS.

The Fifth Circuit's opinion below questioned the federal government's interest in crime prevention and, specifically, the possession of guns within 1,000 feet of a school. *Lopez*, 2 F.3d at 1366-67. The opinion also suggested that Congress may only enact legislation that directly or indirectly regulates interstate crime or the actual flow of firearms across state lines. Finally, the Fifth Circuit concluded that Congress has made no specific findings about the relationship between the possession of guns and interstate commerce, expressing doubt that any relationship exists. *Id.* at 1364-68. On each of these points, the Court of Appeals was wrong.

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[6] Even the *Lopez* court conceded that the determination of a rational basis for legislation is "peculiarly within the province of Congress, rather than the Courts." *Lopez*, 2 F.3d at 1362.

[7] In *Hodel*, this Court flatly rejected the argument that the "rational basis" test should not apply if the activity being regulated is arguably purely local in character. *Hodel*, 452 U.S. at 281.

Juvenile crime and, particularly, drug use and gang violence in the schools have become some of the most important issues facing the country today. To the extent that the Fifth Circuit suggested that crime is purely a local concern, the court was gravely mistaken. To the extent that the Fifth Circuit suggested that federal weapons legislation must directly affect commerce in weapons, it was also mistaken. While legislation enacted pursuant to the Commerce Clause must have a substantial effect on interstate commerce, that effect need not be directy attributable to the precise activity regulated by the statute. *See, e.g., Hodel*, 452 U.S. 264 (Congress may regulate mining if it substantially affects interstate commerce by destroying fish and wildlife). "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commerce power." *New York v. United States*, —— U.S. ——, 112 S. Ct. 2408, 2419 (1992). Thus, if federal crime prevention legislation has a substantial effect on *any* aspect of interstate commerce, it is permissible under the Commerce Clause.

The prevalence of crime, the possession of firearms and the presence of weapons in schools are all directly related and they all substantially affect interstate commerce—both commerce in firearms as well as other significant interstate commerce concerns. Moreover, although not constitutionally required, there already are substantial congressional findings that provide a Commerce Clause basis for upholding the constitutionality of Section 922(q).

A. Crime Seriously Affects Interstate Commerce.

On October 1, 1992, Senator Kohl made the following observations in his opening remarks to the Senate Judiciary Committee hearing on "Children Carrying Weapons":

> With gang, drug and other criminal activity on the rise, it's clear that we are becoming a more violent society. We need to control the flow of weapons that are falling into the wrong hands—including the hands of youngsters. We need to keep our children safe in our schools so they can learn to become productive adults and seek mature, rational ways to solve their problems. By allowing guns in schools and allowing youngsters to live in fear of their lives on a daily basis, we're not offering them much hope for the future.

Children Carrying Weapons, at 8 (statement of Sen. Kohl). Although national significance alone does not necessarily give Congress constitutional authority to legislate, the substantial effects of crime on interstate commerce are all too apparent:

> In "A Community of Self-Reliance," [the American Enterprise Institute] profiles the crushing burden high crime rates place on the business activity depressed areas need so badly: "Crime lowers property values, making it harder for the urban poor to accumulate capital and to borrow money. Crime is one of the major reasons why businesses in central cities restrict operations, relocate, sell, or close down. Businesses in high crime areas face sharply higher operating costs, including higher labor costs and investments in a security force, improved lighting, alarms, metal grills for windows and doors, and—if available at all—extremely expensive insurance." In other words, burglars and violent criminals have at times established a blockade between the residents of poor communities and the jobs they so desparately need.

133 Cong. Rec. H1778 (daily ed. Apr. 2, 1987) (statement of Rep. Lungren).

Congress and the courts have noted, for example, the direct connection between crime and rising insurance rates. *Compare* 138 Cong. Rec. E1532 (daily ed. May 27, 1992) (statement of Rep. Hamilton) ("We pay the cost of crime in higher taxes, insurance rates and prices

for goods and services . . . .), *with Evans*, 928 F.2d at 862 (Congress may reasonably conclude that possession of firearms affects the national economy through the insurance industry). Crime also has a detrimental effect on urban revitalization. *See* 138 Cong. Rec. S15,041 (daily ed. Sept. 25, 1992) (statement of Sen. Lieberman) ("I think people understand at the core of the problems of urban America, which express themselves in crime and unrest, is the exit of manufacturing businesses.").

Perhaps crime's most striking effect on interstate commerce is its effect on business relocation decisions. In the words of Congressman Horn: "The connection between peace in the streets and economic growth is clear. As Richard Riordan, the . . . mayor of Los Angeles, has said, 'No business wants to locate in a war zone.'" 139 Cong. Rec. H3917 (daily ed. June 22, 1993) (statement of Rep. Horn). In *Katzenbach*, this Court recognized that Congress may regulate activities that affect industry relocation. The Court found an effect on interstate commerce because "discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there." 379 U.S. at 300.

The effects of crime on insurance, urban revitalization and business relocation are just a few of the ways in which crime substantially affects interstate commerce.[8]

B. The Possession of Guns Seriously Affects Interstate Commerce.

The court below was concerned that Section 922(q) criminalizes the "mere simple possession" of a gun by an individual. *Lopez*, 2 F.3d at 1348. Indeed, the *Lopez*

[8] Crime also has a significant effect on tourism. *See* 140 Cong. Rec. E739 (daily ed. Apr. 21, 1994) (statement of Rep. Gekas) ("[C]rimes against tourists must be addressed if the industry is to provide consumers with the most for their tourism dollar"); 140 Cong. Rec. H2362 (daily ed. Apr. 14, 1994) (statement of Rep. Owens) ("[I]f we do not talk about controlling guns, we . . . are endangering the tourism industry.").

decision's extensive review of federal gun legislation seemed designed to show the lack of congressional findings supporting a nexus between the "mere" possession of firearms and interstate commerce. Yet, in enacting these very statutes, Congress made unambiguous findings of precisely such a nexus. In fact, there is no shortage of legislative materials identifying the abundant effects of gun possession on interstate commerce. And, in any event, there is ample evidence that at some point in time nearly all guns travel in interstate commerce.

More than a quarter century ago, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968). Title VII of the Act, entitled "Unlawful Possession or Receipt of Firearms," included the following specific findings regarding gun possession:

> The Congress hereby find[s] and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes . . . (1) a burden on commerce or threat affecting the free flow of commerce.

Id. § 1201. In *United States v. Bass,* this Court recognized the validity of these findings and their significance:

> The Government argues that these findings would have been "wholly unnecessary" unless Congress intended to prohibit all receipts and possessions of firearms by felons. But these findings of "burdens" and "threats" simply state Congress's view of the constitutional basis for its power to act; the findings do not tell us how much of Congress's perceived power was in fact invoked. *That the findings in fact support a statute broader than the one actually passed* is suggested by the fact that "in commerce or affecting commerce" does not appear at all in the introductory clause to the "findings," even though § 1202(a) con-

> tains the phrase and concededly reaches only transportation "in commerce or affecting comerce."

404 U.S. at 345-46 n.14 (emphasis added). While the Court found that Section 1202 as written required a prosecutor to prove a connection to interstate commerce for an individual conviction, the Court indisputably recognized that Congress had made findings that would have supported a statute prohibiting the mere possession of guns by dangerous classes of people.[9] The suggestion of the court below that Congress has never made such findings is simply erroneous.[10] *Lopez*, 2 F.3d at 1352, 1368.

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[9] The Court in *Bass* did not reach the question of whether, even in the presence of these findings, Congress could constitutionally punish the possession of firearms. *Bass*, 404 U.S. at 339 n.4. However, the Court's acknowledgment that the findings would have supported broader legislation suggests the likely result.

[10] With the Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (1986), the substantive portions of Title VII were incorporated into Section 922 (part of Title IV of the 1968 Act), and Title VII was repealed. Contrary to the Fifth Circuit's suggestion, *see Lopez*, 2 F.3d at 1352, this repeal did not constitute a rejection of the findings contained in the original Section 1201. The legislative history of the 1986 Act makes this clear:

> A second major change incorporated in section 102, creates a coordinated and consistent definition of persons prohibited from possessing, transporting, and receiving firearms. Existing law is deficient in that 18 U.S.C. section 922 defines four classes of persons forbidden firearms receipt, while section 1202 defines six classes—only two of which resemble section 922's categories—of persons forbidden firearm possession and transportation. . . .
>
> S. 1030 replaces these inconsistent rules with a straightforward and consistent one. . . . [S]ections 102 (f) and (g) amend 18 U.S.C. section 922 *to prohibit firearm possession*, receipt or transportation by convicted felons, fugitives from justice, users of certain drugs, persons subject to an adjudication as a mental defective or a commitment order, illegal aliens, those who have received a dishonorable discharge, and those who have renounced their citizenship.

S. Rep. No. 476, 97th Cong., 2d Sess. 19 (1992) (emphasis added).

Congress's findings that the possession of guns by a class of individuals affects interstate commerce are significant both in this case and for other crime legislation. These findings, as upheld by this Court, indisputably show that Congress has the power to regulate gun possession. These and other legislative findings also demonstrate that Congress perceived that it has the constitutional authority to prohibit gun possession by groups likely to commit gun-related crimes. This view is manifest in the findings enacted in conjunction with Title IV of the 1968 Act.

> [T]he ease with which any person can acquire firearms other than a rifle and shotgun (including criminals, *juveniles without the knowledge or consent of their parents or guardians,* narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such [firearms] is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States.

18 U.S.C. § 921 note (emphasis added).

Subsequent legislation, while emphasizing the rights of law-abiding individuals to use guns for lawful purposes, also has stressed that gun possession by criminals must be controlled. *See* the Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1214 (1968) (codified at 18 U.S.C. § 921 note) (purpose of Act to fight "crime and violence," not to place restrictions on law-abiding citizens); the Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 921 note) (same). Thus, where gun possession by categories of people may have a tendency to lead to crime, Congress has determined that it may prohibit such possession pursuant to its power under the Commerce Clause.

Two federal courts of appeals have held that federal legislation regulating the possession of guns may be en-

acted pursuant to the Commerce Clause. Both *United States v. Hale*, 978 F.2d 1016, and *Evans*, 928 F.2d 858, rejected Commerce Clause attacks on 18 U.S.C. § 922(o), which prohibits possession of a machine gun. The *Evans* opinion explained that the statute "easily" fit within Congress's commerce power because: "Congress specifically found that at least 750,000 people had been killed in the United States by firearms between the turn of the century and the time of the Act's enactment. It was thus reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry." 928 F.2d at 862.

In *Hale*, the Eighth Circuit cited both the reasoning in *Evans* and the congressional findings in the 1968 Act as bases for upholding Section 922(o). 978 F.2d at 1018. In fact, aside from the decision below, no federal appeals court has ever overturned a gun possession statute on the grounds that it exceeded Congress's power under the Commerce Clause.

It is also significant that virtually all guns travel in interstate commerce. The House Judiciary Committee recently issued a report to accompany H.R. 3098 acknowledging that fact: "The Congress finds and declares that . . . even before the sale of a handgun, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce." H.R. Rep. No. 389, 103d Cong., 1st Sess., at 1 (1994).

This is not the first time that Members of Congress have recognized that nearly all guns, or at least their component parts, have at one time moved in interstate commerce. Senator D'Amato has reported that 96 percent of firearms travel through interstate commerce. 137 Cong. Rec. S8667 (daily ed. June 26, 1991) (statement of Sen. D'Amato).[11]

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[11] The legislative history of the Gun Control Act of 1968 recognized the degree to which guns travel across state lines, citing

These findings and statistics bring the regulation of gun possession squarely within the commerce power. *See Perez*, 402 U.S. at 154 ("[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (emphasis in original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

Although the Fifth Circuit's decision in *Lopez* does not ultimately hold that all federal laws regulating the possession of guns are unconstitutional, the thrust of its opinion suggests just that. As the Eighth and Ninth Circuits have recognized, federal legislation regulating the possession of guns is within Congress's Commerce Clause power. If this Court were to adopt the Fifth Circuit's reasoning in this regard, it would adversely affect a wide range of federal crime legislation, both existing and proposed, that is designed to deal with the overwhelming national problem of gun-related crime—a devastating phenomenon with grave and substantial effects on interstate commerce.

C. The Possession of Guns in Schools Substantially Affects Interstate Commerce.

The National Crime Survey, released by the Department of Justice in 1991, catalogued the problem of guns in schools and the deadly symbiotic relationship between drugs, gangs and guns. Nearly three million thefts and violent crimes occur at or near schools every year. About half of all violent crimes against young people between the ages of 12-19 occur in school buildings, on school property, or on adjacent streets. Twelve percent of the violent crimes in school buildings, according to the survey, involve an offender with a weapon. Catherine J. Whitaker,

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testimony "documenting the fact that the purchase of . . . firearms by persons in other than their residence State is a serious contributing factor to crime," and that "large numbers of criminals and juveniles have availed themselves of this source of firearms . . . ." S. Rep. No. 1501, 90th Cong., 2d Sess. 24 (1968).

Ph.D. & Lisa D. Bastian, *Teenage Victims, A National Crime Survey Report*, U.S. Department of Justice, May 1991, NCJ-128129.

On November 19, 1993, the Senate passed legislation that would amend Section 922(q) to include, *inter alia*, the following findings:

> (C) firearms and ammunition move easily in interstate comerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;
>
> (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
>
> (E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
>
> (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> (G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States.

Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103d Cong., 1st Sess. § 2972 (*reprinted* as amended by the Senate at 139 Cong. Rec. S17,153-54 (daily ed. Nov. 24, 1993)); *see also* 139 Cong. Rec. S16,301 (daily ed. Nov. 19, 1993) (passage of Act by Senate). Given the deference accorded Congress when it makes specific findings in support of a statute's constitu-

tionality, there should be no question about the constitutionality of Section 922(q).[12]

Beyond the obvious importance of an educated populace to the national economy [13] and the fact that nearly all guns, including those around schools, have traveled through interstate commerce, there are at least three ways in which the possession of guns on or near school grounds affects interstate commerce. First, business location and expansion decisions invariably involve consideration of the quality of local education, including the level of violent crime in schools. Second, interstate commerce is substantially affected by juvenile violence—and eliminating guns from schools is a rational step in dealing with this problem. Finally, there is a clear connection between the presence of firearms in and around schools and the sale of drugs.

Violence in schools has a significant impact on business decisions. *See* 138 Cong. Rec. S12,459 (daily ed. Aug. 12, 1992) (statement of Sen. Bradley) ("[M]any businesses interested in relocating to distressed areas will find the crumbling infrastructure of those cities to be a disincentive . . . ."). In 1979, the Subcommittee on Fiscal and Intergovernmental Policy of the Joint Economic Committee of Congress commissioned a study on the major problems facing central city businesses. Subcommittee on Fiscal and Intergovernmental Policy of the Joint Economic Committee: Congress of the United States, 95th Cong., 2d Sess., Central City Businesses—Plans and Problems (Comm. Print 1979). The study concluded that when businesses decide whether to relocate, alter the size of their work force or expand their operations,

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[12] That these findings post-date the Act is of no significance because it was unnecessary for Congress to have supported the statute with findings at all. What these findings summarize and demonstrate, regardless of their timing, is the clear Commerce Clause basis for the legislation.

[13] The importance of an educated populace to the national economy is discussed in detail in the brief for the United States.

they are more concerned with a location's quality of life than its tax rates, business costs and labor factors. *Id.* at 3. The study further concluded that *the number one perceived disparity between cities with the most favorable business climate and those with the least favorable was the quality of a city's schools. Id.* The substantial connection between gun possession in schools and commerce could not be more clear.

Beyond the importance of safe schools, Congress has recognized that juvenile crime—particularly where firearms are involved—has a significant effect on interstate commerce. For instance, the House Select Committee on Children, Youth, and Families held hearings on the issue of children and guns that demonstrated how the increase in firearm possession by juveniles has affected the health care and health insurance industries. *See Children and Guns: Hearings before the House Select Committee on Children, Youth, and Families*, 101st Cong., 1st Sess. 2, 5, 82 (1989) (statements of Rep. Miller and Thomas Scalea, M.D.).[14] While regulating the possession of guns in the immediate area of a school will not entirely solve the problems brought about by juvenile possession of guns, such regulation is logical. *See generally Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) (rational for legislature to proceed step by step in addressing problems).

A final, striking way in which possession of guns in and around schools implicates interstate commerce is the connection between gun possession and drug sales. According to the Center to Prevent Handgun Violence, 18 percent of all weapons in school incidents are drug- or gang-related. A report from the Bureau of Justice Statistics indicates that more than 13 percent of convicted offenders held in

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[14] Congressional findings made in conjunction with Title IV of the 1968 Act specifically identify juvenile access to firearms as a "significant factor in the prevalence of lawlessness and violent crime in the United States." 18 U.S.C. § 921 note. Thus, to the extent that crime itself affects interstate commerce, juvenile gun possession makes a particularly strong contribution.

local jails in 1989 claimed they had committed their offense for money to support a drug habit. Eighteen percent of those surveyed admitted to being under the influence of a drug at the time of the offense. *Children Carrying Weapons*, at 36 (statement of Ronald D. Stephens).

Congress's power under the Commerce Clause to regulate activities related to the possession and sale of drugs is well recognized. *See, e.g., United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991); *United States v. Lopez*, 459 F.2d 949, 951-53 (5th Cir.), *cert. denied*, 409 U.S. 878 (1972). In 1989, the House Select Committee on Children, Youth, and Families was told that an estimated "40 percent of the violence that we see in people under 25 years of age is drug-related violence." *Children and Guns*, at 81 (statement of Thomas Scalea, M.D.). The relationship between drugs, guns and juveniles was recently discussed in detail in connection with House bill 3098 and Senate bill 1087. If enacted, these bills would amend Section 922 to prohibit the possession of handguns or handgun ammunition by juveniles (with certain limited exceptions). Specific "Findings and Declarations," contained in each bill, state:

> Just as the hardened drug kingpins begin their life in the illicit drug culture by exposure to drugs at a young age, violent criminals often start their criminal careers on streets where the ready availability of guns to young people results in the acceptability of their random use. . . . Violent crime and the use of illicit drugs go hand-in-hand, and attempts to control one without controlling the other may be fruitless.

H.R. 3098, 103d Cong., 1st Sess. (1993); S. 1087, 103d Cong. 1st Sess. (1993).[15]

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[15] These bills were both passed in their respective Houses. *See* 139 Cong. Rec. H10,314-19, H10,404 (daily ed. Nov. 20, 1993); 139 Cong. Rec. S15,412-25 (daily ed. Nov. 9, 1993). Thus, each House of Congress has voted to approve the findings. Both bills are currently being incorporated into more sweeping crime legislation.

In fact, contrary to the Fifth Circuit's suggestion that the Gun-Free School Zones Act's legislative history does not reflect a commerce nexus, the relationship between guns, drugs and schools was discussed in the hearings leading to the Act:

> I'd like to add here that what we are seeing in the city of Cleveland is an acceleration of violence, not only by juveniles but by young people up to the age of 21 who are banding together and forming gangs and trying to take control of drug trafficking. And since these young people hang out primarily in the playgrounds around the schools, and have members that are attending schools, the incidence of weapons in the schools has risen . . . .

The Gun-Free School Zones Act of 1990: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary, 101st Cong., 1st Sess. 26-27 (1990) (statement of Edward Kovacic). The Senate Judiciary Committee heard similar testimony:

> The gang factor has become an ever-increasing flow on the proliferation of both drugs and gangs in our schools. The primary source of income for most gangs is trafficking of drugs. As street narcotic enforcement programs become more effective, we force gang members to distribute narcotics in schools. Children of all ages are used to further this purpose. . . . Recruitment is achieved through offering children incentives that they perceive are lacking in their homes. If this cannot be accomplished, it is often then done through fear and intimidation. . . . With controlling the flow of weapons and drugs into the schools, we can lessen their influence in the school environment.

See Children Carrying Weapons: Why the Recent Increase: Hearing Before the Senate Committee on the Judiciary, 102d Cong., 2d Sess. 23 (1992) (statement of Lt. Thomas Byrne). A student essay read at the Senate hearing reported that approximately 50 percent of the students in one school carried weapons to school and that

most handguns are carried by student drug dealers. *Id.* at 34. Even the decision below acknowledged that Congress's commerce power supports legislation controlling the possession and sale of drugs. *See Lopez*, 2 F.3d at 1366-67 n.50. Because it is simply undeniable that weapons are being carried into schools to support the drug trade, the constitutionality of Section 922(q) could rest on this factor alone.

One federal appeals court decision and three federal district court decisions have recognized the nexus between commerce and the possession of guns in schools and, therefore, have upheld the constitutionality of Section 922(q).[16] Three courts rested their decisions on the general link between commerce and the possession of firearms. *United States v. Edwards*, 13 F.3d at 294; *United States v. Ornelas*, 841 F. Supp. at 1092 and *United States v. Holland*, 841 F. Supp. at 144. The other court specifically discussed the connection between guns, drugs and gangs. *United States v. Glover*, 842 F. Supp. at 1336-37. The adverse effect that gun violence in the schools has on business relocation decisions represents yet another substantial connection to interstate commerce. *See supra* at 21. Regulation of the possession of guns in and around schools has a clear nexus to interstate commerce concerns and, therefore, Section 922(q) should be upheld.

III. CONGRESS HAS BROAD AUTHORITY TO REGULATE PRIVATE ACTIVITIES AFFECTING INTERSTATE COMMERCE.

The Fifth Circuit applied the wrong standard when it analyzed the Tenth Amendment challenge to the Gun-Free School Zones Act. The opinion below cited *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), for the proper standard to determine whether the Tenth Amendment bars the federal regulation at issue.

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[16] *But see United States v. Trigg*, 842 F. Supp. 450 (D. Kan. 1994); *United States v. Morrow*, 834 F. Supp. 364 (N.D. Ala. 1993).

See Lopez, 2 F.3d at 1366. In doing so, the court incorrectly treated the Act as a law regulating the states *qua* states. The Act, however, applies only to "persons." *See* 18 U.S.C. §§ 921(a)(1), 922(q)(1). The statutory definition of person, "any individual, corporation, company, association, firm, partnership, society, or joint stock company," does not include states. *Id.* § 921(a)(1). In fact, nowhere does the Act subject states to regulation.

This Court consistently has distinguished Congress's power to regulate private behavior, which does not raise Tenth Amendment questions, from Congress's power to regulate a state's activities, which does raise them. In *Hodel*, this Court rejected as "incorrect" the assumption that "the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce." 452 U.S. at 289.[17] Quite simply, the Commerce Clause empowers Congress to displace all state regulation of private activities affecting interstate commerce. *See, e.g., Campbell v. Hussey*, 368 U.S. 297 (1961).

Thus, a federal statute displacing even a state's exercise of police powers does not offend the Tenth Amendment. *See, e.g., United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *United States v. Darby*, 312 U.S. at 113-14; *United States v. Carolene Products Co.*, 304 U.S. 144, 147-48 (1938); *Hoke v. United States*, 227 U.S. 308, 320-23 (1913); *Athanasaw v. United States*, 227 U.S. 326 (1913). Nor would any adverse impact on state and local economies from the federal regulation of private activities raise Tenth Amendment concerns. *See, e.g., Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-35 (1941). Similarly, the fact that the Act here does not foreclose

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[17] In that case, the Commonwealth of Virginia, a town in Virginia, and several private parties engaged in surface coal mining claimed that the federal statute violated the Tenth Amendment by interferring with the state's ability to exercise its police power over land uses. *Id.*

all state involvement in regulating the private activity—individual possession of guns around schools—does not raise Tenth Amendment concerns. *See Hodel*, 452 U.S. at 290. Congress's power to pass such legislation is not diminished "simply because [it] chose to allow the States a regulatory role." *Id.*

The only limit on Congress's authority to regulate private activities under the Commerce Clause is "the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" *Id.* at 286 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. at 262).[18] Moreover, the manner of regulation chosen by Congress need not be the approach that a court would have taken; it just cannot be irrational. *See Heart of Atlanta Motel*, 379 U.S. at 261 ("It may be argued that Congress could have pursued other methods to eliminate the obstructions that it found in interstate commerce. . . . But this is a matter of policy that rests entirely with the Congress not with the courts."). In this case, because Congress's purpose for passing the Act—ending violent crime in and around schools—is both within its Article I powers and rationally related to the terms of the statute, that should be the end of the Tenth Amendment inquiry.

Even if the Court were to subject the Gun-Free School Zones Act to a Tenth Amendment inquiry, the Act would be constitutional. *See Garcia*, 469 U.S. at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than of result."). Moreover, even where this Court has

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[18] In other words, the proper test for determining the Act's constitutionality under the Tenth Amendment is whether Congress had a "rational basis" for finding that gun possession in and around schools affects interstate commerce. *See Hodel*, 452 U.S. at 283-93 (holding federal regulation of the use of private lands does not violate the Tenth Amendment under the rational basis test despite intrusion on state regulation of the lands).

held that a federal law violates the Tenth Amendment, *see National League of Cities v. Usery*, 426 U.S. 833, 840 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth., supra*, the Tenth Amendment's protection has not covered private activities.[19] Although this Court overturned *National League of Cities* in *Garcia*, nothing in *Garcia* suggests that the requirement that the federal law regulate states as states to implicate the Tenth Amendment is eroneous. 469 U.S. at 537-38.

CONCLUSION

For all the foregoing reasons, Congress acted constitutionally and within its commerce power when it passed the Gun-Free School Zones Act. This Court should reverse the decision of the Fifth Circuit in *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993).

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[19] In *National League of Cities*, the Court emphasized that different constitutional considerations are implicated when Congress regulates states rather than private entities: "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to States as States." *National League of Cities*, 426 U.S. at 845.

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OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

ALFONSO LOPEZ, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief of Center to Prevent Handgun Violence, American Federation of Teachers, Council of Great City Schools, National Association of Elementary School Principals, National Association of Secondary School Principals, National Education Association, National PTA, Major Cities Chiefs of Police, International Association of Chiefs of Police, National Association of Police Organizations, Fraternal Order of Police, Federal Law Enforcement Officers Association, Police Executive Research Forum and National Organization of Black Police Enforcement Executives As Amici Curiae In Support of the Petitioner

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QUESTION PRESENTED

Whether Congress acted within its authority under the Commerce Clause of the Constitution in enacting the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which prohibits the possession of a firearm in or within 1,000 feet of a school.

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INTEREST OF THE AMICI[1]

The Center to Prevent Handgun Violence (the "Center"), chaired by Sarah Brady, is a non-profit organization working to reduce firearm deaths and injuries through education, research and legal advocacy. Through its Legal Action Project, the Center participates in key court cases throughout the nation, advocating legal principles to reduce gun violence. In addition, the Center pioneered the development of a gun violence educational curriculum now in use in major urban school systems from New York to Los Angeles. The purpose of the statute at issue here -- to keep guns out of the nation's schools -- is a core concern of the Center.

The members of the national education organizations that have joined the Center on the brief must address the threat of gun violence in the schools every day. Their interest in preserving federal criminal sanctions for the possession of guns in and near schools is direct and immediate.

The members of the law enforcement groups that have joined the brief have an obvious interest in ensuring that schools remain free of gun crime and violence. In addition, the law enforcement community has an equally strong interest in preserving federal regulatory authority over firearms as a necessary supplement to state and local authority.

Brief descriptions of each of the education and law enforcement groups follow.

- The American Federation of Teachers is a national labor union affiliated with the AFL-CIO, which represents more than 800,000 members who work in public elementary and secondary schools, community colleges and universities, state government and health care.

- The Council of Great City Schools is a coalition of the nation's largest urban public schools. The Council works

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[1] Counsel for both petitioner and respondent have consented to the filing of this brief *amici curiae*. Their consents are on file with the Clerk of the Court.

to improve education for the nation's inner city children through legislative advocacy, research, the media and other special projects.

- The National Association of Elementary School Principals is a professional organization serving more than 25,000 elementary and middle school principals and other educators throughout the world.
- The National Association of Secondary School Principals is a voluntary association of approximately 43,000 administrators of public and private secondary schools throughout the United States.
- The National Education Association is a nationwide labor organization with a current membership of more than 2 million education employees.
- The National PTA, a not-for-profit organization with more than 6.9 million members, is devoted to parental involvement in the education, safety and protection of children, and has been a major supporter of the Gun-Free School Zones Act.
- The Major Cities Chiefs of Police is made up of the chief executives of forty-seven of the larger city police departments in the United States.
- The International Association of Chiefs of Police is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in seventy-two nations.
- The National Association of Police Organizations is a national law enforcement organization representing more than 157,000 law enforcement officers and 3,000 police unions and organizations throughout the United States.
- The Fraternal Order of Police is the nation's largest rank and file group with 248,000 members, forty-three state lodges and more than 1,700 local lodges.

- The Federal Law Enforcement Officers Association, with more than 8,000 members, is the largest professional association in the nation exclusively representing federal law enforcement officers and criminal investigators.

- The Police Executive Research Forum ("PERF") is an organization of progressive law enforcement executives who serve more than thirty-five percent of the nation's population. PERF members are dedicated to improving policing practices through leadership, research, experimentation and debate.

- The National Organization of Black Police Enforcement Executives has 3,500 members, including police chiefs, command-level law enforcement officials and criminal justice educators.

All of these *amici* are concerned that Congress not be subject to the sorts of constraints imposed by the court below when exercising its authority under the Commerce Clause to regulate guns and gun violence. Rather, so long as Congress could rationally have concluded that gun possession, whether generally or specifically in school zones, affects interstate commerce, Congress's authority to enact the Gun-Free School Zones Act should be upheld. It is clear that Congress could properly have arrived at such a conclusion, given the tremendous toll imposed on the national economy by guns and gun violence.

SUMMARY OF THE ARGUMENT

Sixty-five students and six school employees were shot and killed at school during the academic years 1986 through 1990. An additional 201 individuals were severely wounded by firearms at school during that same period. And 242 more were taken hostage at gunpoint on school premises.

In 1990, Congress responded to this alarming increase in gun violence in the schools by enacting the Gun-Free School Zones Act, Pub. L. No. 101- 657, Title XVII, 104 Stat. 4844 (codified at 18 U.S.C. § 922(q)(1)(A) (Supp. IV 1992)). The Act amended the existing federal criminal statute regulating the possession and

sale of firearms in order to address the growing national problem of guns in and around schools. The Act prohibits "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A).[2]

Congress was acting well within its constitutional authority under the Commerce Clause in adopting the Gun-Free School Zones Act. This Court has recognized that the "pertinent inquiry" when a federal statute is challenged under the Commerce Clause is "whether Congress could rationally conclude that the regulated activity affects interstate commerce." *Hodel v. Indiana*, 452 U.S. 314, 324 (1981). It is unnecessary for Congress to have expressly invoked the Commerce Clause or to have made specific findings as to the nexus between the regulated activity and interstate commerce. Indeed, to insist that Congress articulate the precise basis for exercising its authority, as did the court below, would constitute an "unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government." *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

Clearly, Congress could have found that firearm possession and use, whether generally or in school zones, has a devastating impact on interstate commerce. Tens of thousands of Americans are killed each year by firearms, and hundreds of thousands suffer debilitating injuries. Among them are the many students, teachers and others who are killed or injured as a result of gun violence in and near schools. These firearm injuries impose a substantial burden on the nation's health care, insurance and public welfare systems. Additional students and teachers are emotionally, even if not physically, wounded by guns in and near schools. The resulting climate of fear threatens to drive teachers from the classroom and to prevent students from developing into fully productive members of American society.

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[2] A school zone is defined as a place in, on the grounds of, or within a distance of 1,000 feet from the grounds of a public, parochial or private elementary or secondary school. 18 U.S.C. § 921(a)(25).

ARGUMENT

CONGRESS WAS ACTING WITHIN ITS CONSTITUTIONAL AUTHORITY TO REGULATE INTERSTATE COMMERCE WHEN IT ADOPTED THE GUN-FREE SCHOOL ZONES ACT

The Constitution grants Congress the authority, without limitation, "[t]o regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Court has repeatedly recognized that "'[t]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.'" *Hodel v. Indiana*, 452 U.S. 314, 321 (1981) (quoting *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939)); *accord Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

It is now well-established that Congress may regulate even purely local activities under the Commerce Clause, as augmented by the Necessary and Proper Clause, wherever such activities "so affect interstate commerce, or the exertion of power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). As Justice Jackson, speaking for a unanimous Court, explained in *Wickard v. Filburn*:

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

317 U.S. 111, 125 (1942). Accordingly, so long as "the *class of activities* is regulated and that *class* is within the reach of federal power" under the Commerce Clause, "the courts have no power

'to excise, as trivial, individual instances' of the class." *Perez v. United States*, 402 U.S. 146, 154 (1971) (citation omitted).[3]

The Court of Appeals invalidated the Gun-Free School Zones Act on the ground that Congress did not expressly articulate a nexus between interstate commerce and the problem of guns at or near schools. But all that this Court has demanded -- and all that may properly be demanded of a co-equal branch of Government -- is that such a nexus could rationally be found to exist. This standard is more than satisfied here.

A. Congress Does Not Exceed Its Authority Under The Commerce Clause So Long As The Regulated Activity Could Rationally Be Found To Affect Interstate Commerce

A statute enacted by Congress pursuant to its power "[t]o regulate commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, comes to this Court with "'a presumption of constitutionality.'" *Hodel v. Indiana*, 452 U.S. at 323 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). Congress cannot be held to have exceeded its authority to regulate under the Commerce Clause unless "no rational basis" could exist for "a congressional finding that the regulated activity affects interstate commerce." *Id.* at 323-24; *see also Perez*, 402 U.S. at 152-56; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S.

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[3] The Court has thus recognized that Congress has the authority under the Commerce Clause to set quotas limiting local wheat production because "[h]omegrown wheat . . . competes with wheat in commerce," *Wickard*, 317 U.S. at 128-29; to prohibit racial discrimination even by restaurants not frequented by interstate travelers in order to eliminate obstacles to interstate travel by black citizens, *Katzenbach v. McClung*, 379 U.S. 294, 300-02 (1964); to proscribe "[e]xtortionate credit transactions, though purely intrastate," because "there is a tie-in between local loan sharks and interstate crime," *Perez*, 402 U.S. at 154-55; and to protect farmland from surface coal mining in order to prevent "losses in agricultural productivity" that "affect[] interstate commerce in agricultural products," *Hodel v. Indiana*, 452 U.S. at 324-26.

241, 258, 262 (1964). In other words, "[t]he pertinent inquiry therefore is . . . whether Congress could rationally conclude that the regulated activity affects interstate commerce." *Hodel v. Indiana*, 452 U.S. at 324.

It is unnecessary for Congress to have explicitly invoked the Commerce Clause as the source of its authority to regulate firearms at or near schools. The "'constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). Nor need Congress have made findings or amassed evidence as to the nexus between interstate commerce and gun possession. "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980) (Burger, C.J.); *see also Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) ("formal findings" of an interstate commerce nexus "of course are not necessary").

The courts' inquiry into whether Congress could rationally have concluded that gun possession has the requisite effect on interstate commerce is thus quite narrow: It "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [such a conclusion]." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). The judiciary does "not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." *Hodel v. Indiana*, 452 U.S. at 326 (quoting *Stafford v. Wallace*, 258 U.S. 495, 523 (1922)).[4]

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[4] The Court recently reiterated an analogous standard in the context of an equal protection challenge to an Act of Congress:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature . . . . In other

This deferential standard of review of Congress's exercise of its authority under the Commerce Clause, as under other provisions of the Constitution, is not a judicial abdication of responsibility. It is instead an essential concomitant of the constitutional separation of powers. This Court has explained that it "accords 'great weight to the decisions of Congress'" precisely because "Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 102 (1973)); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) ("we are '*bound* to approach our task with appropriate deference to the Congress, a co-equal branch'" of the Government, in passing on the constitutionality of federal statutes) (quoting *Fullilove*, 448 U.S. at 472 (Burger, C.J.)) (emphasis added).

To require Congress to articulate the precise source of authority for its enactments -- as the Fifth Circuit did in this case -- would offend settled separation of powers principles. As Justice Powell explained in *Fullilove*:

> Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process.

448 U.S. at 503 (Powell, J., concurring). Indeed, if Congress were suddenly to be required to "articulate its reasons for enacting a statute," *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096,

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> words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993).

2102 (1993), the continued validity of many other provisions on the statute books might well be called into question.[5]

The Fifth Circuit erroneously held that the presumption of constitutionality that ordinarily attaches to Acts of Congress had "less force" in this case. Pet. App. 45a. The court reasoned that a federal statute that deals with what has "traditionally been a state responsibility" -- *e.g.*, "the general control of simple firearms possession by ordinary citizens" -- implicates the Tenth Amendment and thus must be justified by explicit congressional findings. *Id.* Any such exception to the presumption of constitutionality would quickly swallow the rule, however, given that many statutes enacted under the Commerce Clause involve activity once regulated only by the states.[6]

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[5] For example, 18 U.S.C. § 922(o) -- part of the same section of the U.S. Code as the Gun-Free School Zones Act -- bans the mere possession of machine guns, without limitation to those bought, sold or transferred in interstate commerce. Similarly, 18 U.S.C. § 922(p) prohibits, *inter alia*, the possession or receipt of "undetectable" firearms. If the Fifth Circuit's novel standard of review were to prevail, the continued validity of these two provisions would be called into question. So, too, would the validity of the ban on the possession of semi-automatic assault weapons that has recently been passed by both Houses of Congress. *See* 140 Cong. Rec. H3111 (daily ed. May 5, 1994). It is of particular concern to these *amici*, including seven law enforcement organizations, that these common-sense laws that promote public safety not be undermined.

[6] The statutes challenged under the Commerce Clause in *Carolene Products*, *McClung* and *Perez*, for example, also involved activities whose regulation had traditionally been a state responsibility -- the sale of adulterated foods, *see Carolene Products*, 304 U.S. at 150 n.2 (citing state statutes that preceded federal statute); a hotel or restaurant owner's exercise of its "right to choose its customers and operate its business as it wishes," *Heart of Atlanta Motel*, 379 U.S. at 244; *see id.* at 259 n.8 (citing state statutes that preceded federal statute); and the extortionate lending and collection activities of local "loan sharks," *see Perez*, 402 U.S. at 149 (quoting congressional opponent's comment that statute

The Fifth Circuit "dr[e]w support" for its insistence on explicit congressional findings from a line of cases requiring that when Congress intends to intrude on state prerogatives, Congress must articulate that intent clearly. Pet. App. 46a-47a (citing *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989); *United States v. Bass*, 404 U.S. 336 (1971)). But the statutory construction issue in those cases -- *i.e.*, whether or not Congress intended to reach certain activity -- is quite different from the constitutional issue in this case. No question exists as to what activity Congress intended to reach in the Gun-Free School Zones Act. And thus no risk exists here, as in *Gregory* and *Union Gas*, of unintended federal intrusion into areas traditionally reserved to the states. Instead, the question in this case is whether Congress's unambiguous intent to regulate gun possession in and near schools is to be judicially nullified merely because Congress did not make explicit findings as to the nexus between gun possession and interstate commerce. As in *Fullilove*, however, "[n]either the Constitution nor our democratic tradition warrants such a constraint on the legislative process." 448 U.S. at 503 (Powell, J., concurring).

B. Congress Could Rationally Have Concluded That The Gun-Free School Zones Act Regulates Activity That Affects Interstate Commerce

The Gun-Free School Zones Act satisfies constitutional scrutiny under the proper Commerce Clause inquiry: "whether Congress could rationally conclude that the regulated activity affects interstate commerce." *Hodel v. Indiana*, 452 U.S. at 324. The possession of guns, as a general matter, affects interstate commerce, as demonstrated by facts before Congress during its consideration of the Act. Moreover, gun possession in and near

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would "'permit prosecution in Federal as well as State courts of a typically State offense'"). Yet, the Court recognized in each of these cases that formal findings of a nexus with interstate commerce were unnecessary. *See Carolene Products*, 304 U.S. at 152-53; *McClung*, 379 U.S. at 304; *Perez*, 402 U.S. at 156.

schools has particular adverse effects on commerce today and far into the future.

It must be emphasized at the outset that Congress was not legislating on a blank slate with the Gun-Free School Zones Act. Congress has not come recently to the regulation of firearms, or to the recognition of the nexus between firearms and commerce. The text of the comprehensive federal firearms statute, of which the Gun-Free School Zones Act is now a part, recognizes that firearms are shipped and carried in interstate commerce, *e.g.*, 18 U.S.C. § 922(a)(1),(e); that firearms are sold and traded across state lines, *e.g.*, 18 U.S.C. § 922(a)(5); and indeed that simple possession of a firearm can "affect[] commerce," *e.g.*, 18 U.S.C. § 922(g),(h). *See also* Pub. L. No. 90-351, § 901(a)(1), 82 Stat. 225 (1968) (congressional findings that "there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce"). The legislative history of these earlier gun control provisions also evinces an understanding of the widespread use of firearms in activity that affects interstate commerce. *See*, *e.g.*, H.R. Rep. No. 99-495, 99th Cong., 2d Sess., at 4, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1330 (machine guns are "used by racketeers and drug traffickers for intimidation, murder, and protection of drugs and the proceeds of crime").

Congress's earlier determinations as to the nexus between firearms and interstate commerce may inform the analysis of whether Congress could rationally have found such a nexus with respect to the activity reached by the Gun-Free School Zones Act. *See generally Metro Broadcasting*, 497 U.S. at 572 ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers

action in that area.") (quoting *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring)).[7]

1. Congress could rationally have found that firearm possession, as a general matter, affects interstate commerce.

Gun possession affects interstate commerce in multiple ways. It is the rare firearm that has not been sold or transported in interstate commerce, or that does not contain components that have been so sold or transported. But guns have their most significant impact on interstate commerce when they are used to kill, to injure, to intimidate and to commit other crimes.

The possession of a firearm is, of course, an essential first step in the use of a firearm. And firearms are used against human beings hundreds of times each day in the United States. The costs of this gun violence -- not only in human terms, but also in economic terms -- are devastating to American society. These costs would fully justify a congressional conclusion that gun possession, wherever it occurs, has a substantial effect on interstate commerce.

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[7] The Gun-Free School Zones Act has been upheld under the Commerce Clause by several lower courts. *E.g.*, *United States v. Edwards*, 13 F.3d 291 (9th Cir. 1993); *United States v. Holland*, 841 F. Supp. 143 (E.D. Pa. 1993); *United States v. Glover*, 842 F. Supp. 1327 (D. Kan. 1994); *United States v. Ornelas*, 841 F. Supp. 1087 (D. Colo. 1994). Courts have similarly upheld other laws criminalizing gun possession without an express commerce nexus or statutory findings. *E.g.*, *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992) (upholding 18 U.S.C. § 922(o), which prohibits possession of machine guns), *cert. denied*, 113 S. Ct. 1614 (1993); *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991) (same); *United States v. Hunter*, 843 F. Supp. 235 (E.D. Mich. 1994) (same); *see also United States v. McDougherty*, 920 F.2d 569 (9th Cir. 1990) (upholding conviction for possession of drugs in school zone under 21 U.S.C. §§ 841(a)(1), 845a), *cert. denied*, 499 U.S. 911 (1991).

In 1985, five years before the Gun-Free School Zones Act was enacted, guns caused "nearly 268,000 injuries, including 31,556 fatalities" in the United States.[8] These firearm injuries cost American society an estimated $14.4 billion, according to the 1989 report *Cost of Injury in the United States: A Report to Congress*.[9] The *Cost of Injury* report calculated the direct costs of the 1985 firearm injuries at $911,411,000 in actual out-of-pocket spending for goods and services: $863,586,000 for medical care, $13,743,000 in home modification and vocational rehabilitation expenses for survivors of firearm injuries, and $34,082,000 in administrative costs to the insurance industry.[10] The remaining $13.5 billion represented the indirect costs to society of workers' (including homemakers') lost productivity due to firearm injuries.[11]

The analysis of the costs of firearm injuries was later updated to 1990 to take into account changes in the number of such injuries, patterns of health care use and inflation. The total cost of the firearm injuries that occurred in 1990 was estimated at

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[8] Wendy Max & Dorothy P. Rice, *Data Watch: Shooting In The Dark: Estimating The Cost of Firearm Injuries*, Health Affairs (Winter 1993) 171, 176 (hereinafter "Max & Rice").

[9] Dorothy P. Rice *et al.*, *Cost of Injury in the United States: A Report to Congress 50* (1989) (hereinafter "*Cost of Injury*"); *see also* Max & Rice at 176, 180 (discussing *Cost of Injury* analysis); Garen J. Wintemute & Mona A. Wright, *Initial and Subsequent Hospital Costs of Firearm Injuries*, 33 J. Trauma 556 (1992) (same).

[10] Max & Rice at 177-79; *see also Cost of Injury* at 55.

[11] Max & Rice at 173, 177; *see also Cost of Injury* at 58, 63. This figure includes the value of time lost from individuals' usual work or household activities because of firearm-related injuries and the current monetary value of future output lost due to premature firearm-related death.

$20.4 billion, including $1.4 billion in direct medical, rehabilitation and insurance costs.[12]

These estimates do not even include the costs to society of the many crimes, such as robbery, rape and kidnapping, that are carried out with the use of firearms. They likewise do not include the costs incurred when citizens, especially those of the inner city, are so fearful of gun violence that they become virtual prisoners in their homes. Nor do they include the costs to communities whose economic development is threatened by their association with gun violence.[13]

All of these costs associated with gun violence may appropriately be considered in determining whether a nexus could rationally be found to exist between gun possession and interstate commerce. As *Wickard v. Filburn* made clear, the relevant inquiry is whether the regulated activity may be deemed to have "a substantial economic effect on interstate commerce," not whether the effect is "direct" or "indirect." 317 U.S. at 125. In much the same manner that the loan sharking in *Perez v. United States* affected interstate commerce by providing organized crime with the means by which to "finance its national operations," 402 U.S. at 157, gun possession affects interstate commerce by providing individuals with the means by which to commit the

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[12] Max & Rice at 181.

[13] There was specific testimony about the economic impact of gun violence on community development at the congressional hearing on another provisions of the Comprehensive Crime Control Act, the omnibus bill in which the Gun-Free School Zones Act was included. Barbara Fass, the mayor of Stockton, California, described the effects of a mass shooting in 1989 at a local school. "It impacts our ability to affect economic development," Mayor Fass testified, "because we are the city where the tragedy occurred." *Automatic Assault Weapons Act of 1989: Hearings on H.R. 1190 and Related Bills Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 141 (1989) (statement of Mayor Barbara Fass).

killings, assaults and property crimes that so severely tax the national economy.

The *Cost of Injury* analysis alone provides an ample factual basis for a congressional conclusion that firearm possession has the requisite effect on interstate commerce. Any activity whose annual consequences impose actual out-of-pocket costs of $1.4 billion on individuals, insurance companies and federal, state and local governments necessarily "is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest.'" *Heart of Atlanta Motel*, 379 U.S. at 255. Moreover, victims of firearm injuries travel from one state to another to obtain medical and rehabilitative services; pharmaceuticals, medical supplies and equipment to care for these individuals also are transported in interstate commerce; and sums of money are transferred across state lines from private insurers and government agencies to hospitals, physicians, disabled victims and others.

Gun possession and consequent gun violence also affect commerce for many of the same reasons that other activity has been found to affect commerce: They "exact[] millions from the pockets of people," *Perez*, 402 U.S. at 156, as a result of property crimes committed by persons wielding firearms. They "degrad[e] the quality of life in local communities" by turning streets, parks and even schools into battle zones, "damag[e] the property of citizens" and "deter[] professional, as well as skilled, people from moving into [certain] areas . . . and thereby caus[e] industry to be reluctant to establish there." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981); *Katzenbach v. McClung*, 379 U.S. at 300. They also "counteract[] governmental programs and efforts," *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277, in such fields as crime control, public health, urban development and education.

Congress need not have actually been aware of the *Cost of Injury* analysis, or other facts demonstrating the nexus between gun possession and interstate commerce, during its deliberations

on the Gun-Free School Zones Act. *See Carolene Products Co.*, 304 U.S. at 154 (Congress's determination that an activity affects interstate commerce must be sustained so long as "any state of facts either known or which could reasonably be assumed affords support for it"). But many members of Congress were, in fact, aware of such analyses of the economic impact of firearm injuries. *Cost of Injury*, as its subtitle reveals, was prepared in 1989 as "A Report to Congress." It was specifically called for by the House of Representatives in supplemental appropriations legislation in 1987, and was funded by the Centers for Disease Control and the National Highway Traffic Safety Administration.[14] Members of Congress have since cited the report's findings in a variety of contexts.[15] A determination that Congress could rationally have found firearm possession to affect interstate commerce, *see Hodel v. Indiana*, 452 U.S. at 324, is particularly justified where the facts supporting such a determination were actually before Congress.

To be sure, Congress has not regulated all firearm possession, but only possession by certain persons (*e.g.*, felons, drug addicts, mental incompetents), or of certain categories of weapons (*e.g.*, machine guns, guns not detectable by metal detectors), and in certain places (*e.g.*, schools and their environs). *See* 18 U.S.C. § 922(g), (o), (p)(1), (q)(1)(A). But it is a "well-established concept that a legislature may take one step at a time to remedy only part of a broader problem." *Fullilove*, 448 U.S. at 485 (Burger, C.J.). That gun possession, in general, affects interstate

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[14] *Cost of Injury* at v-vii.

[15] *See, e.g.*, 135 Cong. Rec. E4059 (daily ed. Nov. 21, 1989) (statement of Rep. Walgren); 136 Cong. Rec. S6250 (daily ed. May 15, 1990) (statement of Sen. Kennedy); 136 Cong. Rec. S15609 (daily ed. Oct. 17, 1990) (statement of Sen. Cranston); 138 Cong. Rec. E2492 (daily ed. Aug. 12, 1992) (statement of Rep. Solarz); 139 Cong. Rec. S5402 (daily ed. May 4, 1993) (statement of Senator Murray); 140 Cong. Rec. S59 (daily ed. Jan. 25, 1994) (statement of Senator Bradley citing updated *Cost of Injury* figures for 1990); 140 Cong. Rec. S2172 (daily ed. March 1, 1994) (statement of Sen. Metzenbaum).

commerce should be sufficient, therefore, to allow Congress to take the lesser step of regulating gun possession in school zones. After all, gun possession and gun violence do not affect commerce any less when they occur in and around schools. Indeed, as demonstrated below, guns in school zones have particularly pernicious effects on commerce.[16]

2. Congress could rationally have found that the possession of firearms in school zones affects interstate commerce.

Congress could rationally have concluded that interstate commerce is adversely affected not only by gun possession generally, but also by gun possession at and in the vicinity of schools. These effects are measured by lost lives, debilitating injuries, abandoned teaching careers and severe disruption of the schools' educational mission.

It had become evident by 1990, the year when Congress adopted the Gun-Free School Zones Act, that gun possession in and around the nation's schools was increasing. So, too, was gun violence.

As testimony at the House Subcommittee on Crime hearing into the Gun-Free School Zones Act revealed, 135,000 students carried handguns to school daily in 1987, and 270,000 more carried handguns at least once during that year.[17] Statistics from

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[16] *See generally United States v. McDougherty*, 920 F.2d at 372 ("Congress has already determined, and the courts have accepted as rational, that drug trafficking affects interstate commerce. It would be highly illogical to believe that such trafficking somehow ceases to affect commerce when carried out within 1000 feet of a school.") (citations omitted).

[17] *Gun-Free School Zones Act of 1990: Hearing on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 7 (1990) (statement of Rep. Feighan) [hereinafter "House Hearing"]. Similar statistics were cited by the Senator Kohl, the sponsor of the Gun-Free School Zones Act, during Senate debate on the

particular school districts also reveal the prevalence of guns at schools. The police chief of Cleveland, Ohio, told the House subcommittee that some 200 guns had been seized in school-related incidents in his city between 1983 and 1990.[18] An investigation in Baltimore, Maryland, found that almost fifty percent of all male students had carried a gun to school in 1987.[19] A study of students at thirty-one high schools in Illinois revealed that five percent of all students had carried a gun to school in 1990.[20]

All too often, these guns are used. So, too, are the guns wielded at or in the vicinity of schools by non-students, including mentally disturbed individuals, drug dealers and others with a personal grievance against students or school employees. Among the incidents called to the attention of the House Subcommittee on Crime were the following:

- In January 1989, a deranged man armed with an AK-47 assault rifle fired on a crowded schoolyard in Stockton, California. Five students were killed. Twenty-nine students and a teacher were wounded. The gunman then took his own life.[21]

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measure. *See* 136 Cong. Rec. S17595 (daily ed. Oct. 27, 1990 ("more than a quarter of a million students carry guns to school every day" and "more than a quarter of a million students brought a handgun to school at least once in 1987").

[18] House Hearing at 25 (statement of Police Chief Edward Kovacic).

[19] Grand Jury Report on Juveniles and Firearms, Circuit Court for Baltimore City, 1987 May Term.

[20] Illinois Criminal Justice Information Authority, *Trends & Issues 91: Education & Criminal Justice in Illinois* 40 (Nov. 1991).

[21] House Hearing at 1; *see also Automatic Assault Weapons Act of 1989: Hearings on H.R. 1190 and Related Bills Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 141-42 (1989) (statement of Mayor Barbara Fass).

- Also in January 1989, a gunman opened fire on a crowd of students outside a high school in Washington, D.C. Four students were wounded. The shooting followed a lunch-time argument, possibly over drugs, between students and outsiders in the school cafeteria.[22]

- In September 1988, a 19-year-old former mental patient opened fire in the classroom and cafeteria of a school in Greenwood, South Carolina. Two students were killed. Two teachers and seven students were wounded.[23]

- In May 1988, a woman shot six students in the washroom and classroom of an elementary school in Winnetka, Illinois. One of the students was killed, while the other five were seriously injured.[24]

All told, at least seventy-one individuals -- sixty-five students and six school employees -- were killed with guns at schools during the academic years 1986 through 1990, according to evidence submitted to the Subcommittee on Crime.[25] An additional 201 persons were severely wounded, and 242 were held hostage at gunpoint.[26] Few states were immune from these incidents. At least thirty-five states and the District of Columbia

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[22] House Hearing at 78; *see also* Terry Atlas, *4 Students Wounded Leaving D.C. School*, Chicago Tribune, Jan. 27, 1989, at 4M.

[23] House Hearings at 41; *see also Second Victim Dies After School Shooting Incident*, New York Times, Sept. 30, 1988, at B-5.

[24] House Hearings at 1, 7; *see also* Robert Enstad & David Ibata, *School Rampage: 1 Dies, 6 Shot Suspect Kills Self After Siege in Winnetka*, Chicago Tribune, May 21, 1988, at 1.

[25] Center to Prevent Handgun Violence, *Caught in the Crossfire: A Report on Gun Violence in our Nation's Schools* (Sept. 1990), *reprinted in* House Hearing at 81.

[26] *Id.*

reported at least one school shooting or armed hostage situation during the period.[27]

According to the *Cost of Injury* methodology for 1985 firearm injuries -- which estimates the total costs to society at $387,235 per fatality and $29,870 per non-fatal injury requiring hospitalization[28] -- these seventy-one firearm deaths and 201 firearm injuries cost society $33,497,555. This figure does not include the costs associated with many firearm injuries that occured off school property but within the 1,000-foot perimeter around schools encompassed by the Gun-Free School Zones Act.

The substantial costs of these injuries are sufficient in themselves to justify a congressional determination that gun possession in and around schools affects interstate commerce. But these are not the only effects on commerce resulting from guns in school zones.

As revealed during the House Subcommittee on Crime hearing on the Gun-Free School Zones Act, gun possession in the vicinity of schools is associated with drug dealing, an activity that Congress has recognized to affect interstate commerce. *See* 21 U.S.C. § 801(3)-(6). An official of the Bureau of Alcohol, Tobacco and Firearms described a federal-state operation in 1990 against drug dealers near elementary and secondary schools in Detroit, Michigan. Twenty-one firearms, including assault weapons, handguns and rifles, were seized during the operation.[29] The police chief of Cleveland also noted the association between gun possession and drug dealing during his testimony before the House subcommittee.[30] The Gun-Free School Zones Act was thus viewed by its congressional sponsors

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[27] *Id.*

[28] *Cost of Injury* at 53.

[29] House Hearings at 14-15 (testimony of Richard Cook, Chief, Firearms Div., Bureau of Alcohol, Tobacco and Firearms).

[30] *Id.* at 25 (statement of Police Chief Edward Kovacic).

as a means of "keep[ing] the areas around our schools from becoming sanctuaries for . . . drug gangs."[31]

Some of the most devastating effects of guns in school zones may not be felt until today's students become adults. These students are being denied the secure academic environment that is so vital to their intellectual, emotional and social development, and thus ultimately to their ability to compete in the economy of the future. As Secretary of Education Richard Riley has observed, the threat of violence in the schools "creates an environment where children cannot learn, teachers cannot teach, and parents are reluctant to send their children to school."[32]

The same point was made in testimony before the House Subcommittee on Crime during its consideration of the Gun-Free School Zones Act. It was observed that fear of gun violence at school is "a significant factor in the dropout rate," "threatens the education goals related to student achievement," and "impedes the ability of schools to attract and retain qualified school personnel."[33] According to a National Education Association report that was called to the subcommittee's attention, "about 8 percent of junior and senior high school students had missed at

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[31] 136 Cong. Rec. S17595-96 (daily ed. Oct. 27, 1990) (statement of Sen. Kohl). Similarly, Representative Feighan observed that "because guns and drugs often are found in close proximity, eliminating guns will contribute to the war against drugs." 135 Cong. Rec. E3988 (daily ed. Nov. 20, 1989).

[32] *Safeguarding Our Youth: Violence Prevention for Our Nation's Children*, Forum Proceedings 8 (July 20-21, 1993) (conference sponsored by National School Safety Center and the United States Departments of Education, Justice, Health and Human Services and Housing and Urban Development).

[33] House Hearing at 46 (statement of Joel Packer, Legislative Specialist, National Education Association and National PTA).

least 1 day of school a month the previous year because they were simply afraid to go to school."[34]

Studies substantiate that exposure to violence has long-lasting adverse effects on children -- effects that may impair their ability to develop into productive members of society. The Journal of the American Medical Association recently reported that exposure to violence affects children's "ability to function in school, emotional stability, and orientation toward the future."[35] These children may display symptoms associated with "post-traumatic stress disorder," including "diminished ability to concentrate in school, persistent sleep disturbances . . . and a nihilistic, fatalistic orientation to the future, which leads to increased risk-taking behaviors."[36]

It should finally be noted that the Senate last year adopted an amendment to the Gun-Free School Zones Act that contains express findings as to the nexus between guns in and around schools and interstate commerce. Violent Crime Control & Law Enforcement Act of 1993, H.R. 3355, § 2972, 103d Cong., 1st Sess. (reprinted as amended by the Senate at 139 Cong. Rec. S17153-54 (daily ed. Nov. 24, 1993)). The Senate declared that "the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country" and that "this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States." 139 Cong. Rec. at S17154. We do not suggest that these Senate findings, which were adopted subsequent to the Gun-Free School Zones Act and which have yet to be adopted by the House, be read into the Act under which respondent was

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[34] *Id.* at 7 (statement of Rep. Feighan).

[35] *Silent Victims, Children Who Witness Violence*, 269 JAMA 262 (Jan. 13, 1993).

[36] *Id.*; *see also* American Psychological Ass'n, *Violence & Youth: Psychology's Response, Vol. I: Summary Report of the American Psychological Ass'n Comm'n on Violence & Youth* 42 (1993).

prosecuted. But these findings are nonetheless relevant to the Commerce Clause analysis. At a minimum, they serve to confirm that guns in school zones may rationally be found -- as the Senate has, in fact, found -- to affect interstate commerce by detracting from the "the quality of education in our country."[37]

In sum, Congress could rationally have concluded that gun possession and consequent gun use in and around schools have a substantial impact on interstate commerce in any of several ways: Students, teachers and others are killed and severely injured in the gunfire, thus generating enormous medical, rehabilitation, insurance and lost productivity costs. Other crimes affecting commerce, such as drug dealing, are facilitated. Teachers are driven from their classrooms, if not from the profession entirely. And students are denied the secure academic environment conducive to acquiring the knowledge, skills and attitudes that they will need to compete in the national, indeed global, economy of the future.

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[37] The court below suggested that, if Congress could prohibit gun possession in school zones without express findings as to a nexus with interstate commerce, Congress "could also similarly ban lead pencils, 'sneakers,' Game Boys, or slide rules." Pet. App. 51a. The Fifth Circuit might well be correct if slide rules, for example, had been used to cause 272 schoolyard deaths and serious injuries over a four-year period, if slide rules were routinely carried by drug dealers, and if students avoided school and were unable to learn while at school out of fear over slide rule violence. But the consequences of gun possession and use in school zones are of an entirely different character and magnitude than the consequences of slide rule possession and use. Accordingly, in concluding that Congress has the authority under the Commerce Clause to deal with the extraordinary problem of guns in school zones, the Court need not conclude that Congress would also have the authority to deal with whatever lesser problems might be posed by slide rules, pencils, sneakers or Game Boys.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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UNITED STATES,

Petitioner,

v.

ALFONSO LOPEZ, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF NATIONAL SCHOOL SAFETY CENTER; NATIONAL CRIME PREVENTION COUNCIL; AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS; NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS; NATIONAL CRIME PREVENTION INSTITUTE; NATIONAL ASSOCIATION OF SCHOOL RESOURCE OFFICERS; NATIONAL ASSOCIATION OF SCHOOL SAFETY AND LAW ENFORCEMENT OFFICERS; DR. STUART GOTHOLD, SUPERINTENDENT OF LOS ANGELES COUNTY SCHOOLS, CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER UNITED STATES

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No. 93-1260

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v.

ALFONSO LOPEZ, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
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BRIEF OF NATIONAL SCHOOL SAFETY CENTER; NATIONAL CRIME PREVENTION COUNCIL; AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS; NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS; NATIONAL CRIME PREVENTION INSTITUTE; NATIONAL ASSOCIATION OF SCHOOL RESOURCE OFFICERS; NATIONAL ASSOCIATION OF SCHOOL SAFETY AND LAW ENFORCEMENT OFFICERS; DR. STUART GOTHOLD, SUPERINTENDENT OF LOS ANGELES COUNTY SCHOOLS, CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER UNITED STATES

INTERESTS OF AMICI

This brief *amici curiae* is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of

this brief has been granted by counsel for the parties; the letters of consent have been lodged with the Clerk of this Court. Consent to addition of *amici* has been given orally.

This case, *United States v. Lopez*, will impact directly on school safety throughout the Nation and specifically the ability of Congress to help ensure that school campuses and surrounding areas are safe and welcoming.

The National School Safety Center (NSSC) is a nonprofit partnership between the United States Departments of Justice and Education and Pepperdine University. The Center is funded by the federal Office of Juvenile Justice and Delinquency Prevention and the Department of Education. This partnership, which NSSC represents nationwide, was established to promote cooperation among the Nation's legal, law enforcement, and education communities to positively and effectively address the problems of crime, violence, vandalism, discipline, and truancy disrupting our Nation's schools.

NSSC is especially concerned that the limitation upon Congress resulting from the Fifth Circuit's decision would be detrimental, because federal involvement may be critical in dealing cooperatively with certain forms of school crime or violence including firearms possession. With its commitment to promote school safety and knowledge of school safety issues, the Center believes it may positively assist the Court in a reasonable and effective manner as it considers the case.

The National Crime Prevention Council (NCPC) is a private, nonprofit, tax-exempt organization that works

with communities around the country to help them prevent crime. The Council conducts public education campaigns, trainings, and demonstration programs; it publishes a variety of materials and works with such major institutions as schools and law enforcement agencies in all 50 states. NCPC is the co-author of the *Teens, Crime, and the Community* curriculum and program, now in use in more than 500 schools and other youth-related institutions. NCPC's mission is to forge a nationwide commitment by people acting individually and together to prevent crime and build safer, more caring communities. Since NCPC is comprised of a network of citizens, professionals, and organizations that implement crime prevention programs at the grassroots level and since its programs involve schools, youth and community groups, NCPC members will be directly influenced by the Court's holding in this case.

The American Association of School Administrators (AASA) is a professional association representing educational leaders in North America and other parts of the world. AASA is dedicated to supporting and assisting school system and other education leaders to achieve the highest quality education for all learners through personal, professional, organizational and leadership development and advocacy for public education. The decision in this case will directly impact AASA members who daily confront the issue of firearms in and around schools.

The National Association of Secondary School Principals (NASSP) is a professional organization representing more than 40,000 site administrators who manage the nation's middle-level and senior high schools. NASSP's

members are directly responsible for the safety and education of our nation's youth. NASSP members are responsible for a major proportion of the Nation's 100,000 schools, 2.4 million teachers, and 44 million students. The growing presence of firearms in the general community poses a major threat to these teachers and students which NASSP members believe must be countered in every way possible.

The National Crime Prevention Institute (NCPI) provides crime and loss prevention training for police officers and managers, security administrators, citizen leaders, and others concerned with public and private safety and security. Since its establishment in 1971, over 30,000 people have taken part in various NCPI programs. NCPI staff and adjunct faculty also conduct research and provide risk analysis audits for public and private organizations. NCPI is located in Louisville, Kentucky, and is a unit of the Justice Administration at the University of Louisville. NCPI trained practitioners will be directly influenced by the Court's decision in this case.

The National Association of School Resource Officers (NASRO) is a professional organization comprised of law enforcement officers working in educational environments, educators and parents concerned about the educational safety of children. NASRO is primarily a training organization to keep officers informed of the most current policies, trends and procedures. NASRO members serve schools in 37 states and Canada and are directly influenced by court decisions about firearms in and around schools.

The National Association of School Safety and Law Enforcement Officers (NASSLEO) is a professional organization comprised of individuals whose primary occupation is the administration or supervision of school security/school police within a school system's administrative structure as well as individuals, firms, agencies or organizations who demonstrate an interest in the aims and interests of NASSLEO. One of the stated objectives of the Association is to promote legislation at the federal level that is in the best interest of children, educational professionals and school security officers. NASSLEO members regularly confront firearms in and around schools and would be directly influenced by the decision in this case.

Dr. Stuart Gothold is the Superintendent of the Los Angeles County, California, Office of Education. This office comprises the second largest urban school district in the Nation and includes 81 school districts, 1,665 schools, 58,669 teachers, and 1,455,867 students. This office is responsible for reviewing suspension, expulsion, and discipline policies to ensure statutory and constitutional compliance by the 81 districts. Therefore, court decisions, such as *United States v. Lopez*, directly impact this office.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2 F.3d 1342 (5th Cir. 1993), *reh'g, en banc, denied*, 9 F.3d 105 (5th Cir. 1993).

SUMMARY OF ARGUMENT

Our Nation's schools must have an environment for learning that is safe and welcoming. Students cannot be expected to learn where schools are plagued with crime and violence.

Schools serve a function of national importance. Their success or failure directly affects the economic viability of this Nation; their success or failure directly affects our capability to prepare and maintain highly skilled individuals for our national defense; and their success or failure directly affects our Nation's quality of life.

Schools face problems caused by crime and violence. These problems are national in scope. The issues of drugs, gangs and weapons in school are integrally related. The federal government can and should play a role in making our schools safe and welcoming.

The impact of the Fifth Circuit's decision limits the role of the federal government in dealing with crime and violence in and around schools. This limitation is unwarranted in view of the modern role of educational institutions and the investment the federal government makes in education. The Commerce Clause allows the federal government to curb school crime and violence through such measures as the Gun-Free School Zones Act of 1990.

In deciding this case, the Court will resolve a split between the Fifth Circuit and the Ninth Circuit. The Ninth Circuit upheld the Gun-Free School Zones Act of 1990 in *United States v. Edwards*, 13 F.3d 291 (9th Cir.

1993). This Court should follow the view of the Ninth Circuit.

ARGUMENT

A. STUDENTS AND STAFF SHOULD ENJOY A HALO OF SAFETY AND SECURITY IN AND AROUND SCHOOLS

"[I]n recent years," as this Court has recognized, "school disorder has often taken particularly ugly forms; drug use and violent crime in the schools have become major social problems." *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Crime and violence affecting schools occurs not only on campus but also in the immediate vicinities and neighborhoods of our schools. Stated succinctly, schools and their immediate surroundings must be "safe and welcoming." *See In re William G.*, 40 Cal. 3d 550, 709 P.2d 1287, 1295, 221 Cal. Rptr. 118 (1985). Students and staff should enjoy a halo of safety and security in and around schools.

Neighborhood factors do impact school safety. *See* 1 NIE, U.S. Dept. of Health, Education and Welfare, *Violent Schools – Safe Schools: The Safe School Study Report to the Congress* at 121-22 (1978). Crime rate and the presence of gangs in school neighborhoods make a difference. *See* NIE, U.S. Dept. of Health, Education and Welfare, *Violent Schools – Safe Schools: The Safe School Study Report to the Congress*, Executive Summary at 9 (1978). School campuses frequently reflect the crime and violence of adjacent areas. *See generally* National School Safety Center,

School Crime and Violence Statistical Review (March 1994) (highlighting various statistical studies).

Statistical data clearly demonstrates the need for a zone of safety and security around our Nation's schools. Eighty-two percent of school district officials recently reported that student violence had increased over the last five years. *See* National School Boards Association, *Violence in the Schools: How America's School Boards are Safeguarding Our Children* (1993). This increase involves, in part, an increase in accessibility to firearms.

A 1990 survey queried 11,631 students in grades 9-12 from the 50 states asking the question: "During the past 30 days, how many times have you carried a weapon, such as a gun, knife, or club for self protection or because you thought you might need it in a fight?" Nearly 20 percent of the students reported they had carried a weapon at least once during the 30 days preceding the survey. *See* Centers for Disease Control Morbidity and Mortality Weekly Report, *Weapon-Carrying Among High School Students – United States, 1990* at 681-2 (1991). This high level of firearms possession among our Nation's youth continues. One recent study suggests that 39.9 percent of Virginia's high school-aged male students surveyed had carried a weapon during the preceding month. *See* Virginia Dept. of Education, *1992 Youth Risk Behavior Survey Report* at 8 (1992). In a larger study, some 22 percent of students from schools in some areas were found to carry guns. National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, *Gun Acquisition and Possession In Selected Juvenile Samples* at 5 (1993). Other studies reflect similar statistics. *See School Crime and Violence Statistical Review, supra; Urban High*

School Youth and Handguns: A School-Based Survey, supra. See also Centers for Disease Control Morbidity and Mortality Weekly Report, *Violence-Related Attitudes and Behaviors of High School Students – New York, 1992* (1993) (21% carry gun or weapon).

Youth are not only carrying firearms to school. They are using them at an alarming rate. Since July 1, 1992, until May 26, 1994, the National School Safety Center has been tracking intentional deaths that have occurred on school campuses. Of the 74 deaths that the Center can specifically document, 47 incidents or nearly two out of every three involved the use of firearms. *See* National School Safety Center, *School Associated Violent Deaths* at 7 (1994). Weapons, in the hands of youngsters, or in the hands of anyone, pose an increasingly serious threat to our Nation's school children. Firearms simply have no place on school campuses or adjacent areas.

B. LEGISLATION MAY REASONABLY ENSURE THE SAFETY AND SECURITY OF SCHOOLS AND SURROUNDING AREAS

Schools serve an essential and critically important function in our society. They also bear some responsibility in creating a safe school environment and in working against crime and violence in the community. Evidence has shown that up to two-thirds of the daytime burglaries nationwide are done by juveniles who are truant from school when the offenses occur. School programs that reduce truancy also reduce crime in the neighborhood. *See* National School Safety Center, *School Safety Check Book* at 69-70 (1990). But schools cannot do it alone,

and government has long taken measures to protect the operations of schools from disruption.

State and local governments have adopted various laws to restrict activities in and around schools. For example, regulations limit the possession or use of alcohol on school property or the location of establishments selling alcoholic beverages within a prescribed distance from schools. Many state legislatures have also responded specifically to school crime and violence through a variety of laws, including those addressing illicit drug use in or near schools and, as here, the possession of weapons. *See generally* J. Menacker and R. Mertz, *State Legislative Responses to School Crime*, 85 Educ. L. Rptr. 1 (1993) (compiling statutes).

As effective as some state or local regulations are or may be, they are often insufficient to deal with the crime and violence facing schools today. Use of firearms, in particular, is not just a state or local problem but a national one. "Firearm injuries among American youth are a nationwide tragedy and an international embarrassment." C. Callahan and F. Rivara, *Urban High School Youth and Handguns: A School-Based Survey*, 267 JAMA 3038 (1992).

Involvement of the federal government in the effort to curb school crime and violence is both important and essential. There are steps Congress may take to directly foster school safety. For example, some 60 percent of teachers believe the federal government should put more law enforcement officers in school neighborhoods to promote school safety. *See* Metropolitan Life Insurance Co., *The Metropolitan Life Survey of The American Teacher 1993* at

14-16 (Louis Harris & Associates, Inc., 1993). The Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), is another such measure.

The need for a national resolve regarding firearms accessibility in and around schools is not only reflected by school crime and violence statistics, such as those previously referenced, but by the number of firearms annually becoming available. In 1991 alone the United States was the home of 79 pistol manufacturers who produced 1,381,325 pistols, 15 revolver manufacturers who produced 456,941 revolvers, 100 rifle manufacturers who produced 883,482 rifles and 31 shotgun manufacturers who produced 828,426 shotguns. The United States is also the recipient of manufactured firearms from at least 20 foreign countries. *See* Department of the Treasury – Bureau of Alcohol, Tobacco, and Firearms, *Yearly Report of Imported Firearms* (1991). The sheer size and scope of this volume of firearm manufacturing and marketing reflects and supports a direct, common-sense correlation between the weapons industry and the need for Congressional action. The limitations placed upon the federal government by the Fifth Circuit should not stand. Congress properly exercised its responsibilities under the Commerce Clause to the American citizenry, including schoolchildren, by passage of the Gun-Free School Zones Act of 1990.

C. THE FIFTH CIRCUIT'S VIEW OF EDUCATION IGNORES THE ROLE AND FUNCTION OF EDUCATIONAL INSTITUTIONS

The Fifth Circuit rejected the view taken by the District Court whereby the Gun-Free School Zones Act of 1990 was sustained on the basis "that the 'business' of elementary, middle and high schools . . . affects interstate commerce." *Lopez, supra*, 2 F.3d at 1366. By doing so, the Fifth Circuit ignored the role and function of educational institutions and effectively adopted a significant limitation on the federal government.

The Fifth Circuit expressed concern that if Congress may bar firearms possession under the Commerce Clause, why not "lead pencils, 'sneakers,' Game Boys, or slide rules"? *Lopez, supra*, 2 F.3d at 1367. To the contrary, if Congress may not bar firearms possession in and around educational institutions, then the Nation's school have lost what may have proved to be the most significant development in helping secure safe schools in recent years. Responses to school crime and violence often require a comprehensive national approach and resolve rather than a patchwork of individual state statutes.

A common means for federal regulation of schools has been conditioning compliance on receipt of federal monies. The statutes regulate the recipient of funds. *See, e.g.*, Crime Awareness and Campus Security Act, Pub. L. No. 101-542, 104 Stat. 2381 (1991).

The Commerce Clause may serve as a basis for the regulation of schools as well. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), for

example, the Court upheld the extension of federal minimum wage and overtime requirements to state and local governments under the Commerce Clause. The Court recognized, in particular, the substantial financial investment the federal government makes in "such services as . . . education." *Id.* at 553. Education may not be considered a purely local activity without interstate impact.

Argument concerning the validity of the Gun-Free School Zones Act of 1990 has revolved around whether a weapon has traveled in interstate commerce. Weapons, the Fifth Circuit concluded, are different than drugs. *See Lopez, supra,* 2 F.3d at 1366-67, n. 50. As recognized by this Court, Congress may regulate even purely intrastate activities that affect interstate commerce. *See, e.g., Perez v. United States,* 402 U.S. 146 (1971); *Fry v. United States,* 421 U.S. 542 (1975). Focus should be directed as in *Garcia* toward the role of educational institutions as they relate to interstate commerce and not merely the route by which a particular weapon may have arrived at or near a school.

The significance of modern schools to interstate commerce should not be obscured. No longer are we dealing with a Nation of little red schoolhouses dotting every village. Public and private schools range from the most basic to great universities undertaking research of national and global significance. Our elementary and secondary schools which benefit from the Gun-Free School Zones Act of 1990 produce not just local residents but those who will go forth throughout the Nation. The inability of Congress to deal directly with problems of firearms in and around schools, whether public or private, directly undercuts this Nation's ability to sustain a

national or global economy by directly and substantially affecting the teachers and students upon whom our future relies. The federal government has, as pointed out in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), made significant investments in education. This is an investment the federal government may rightly protect under the Commerce Clause.

The Fifth Circuit considered "simple firearms possession by ordinary citizens" to have an insufficient impact upon commerce to justify a "singular incursion" by federal legislation. *Lopez, supra*, 2 F.2d at 1364. What might be considered private activity clearly may impact interstate commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). If travelers may be protected against discrimination, then certainly students, some of whom travel to other jurisdictions to attend school, may be protected by Congress as well. Students residing in unsafe areas frequently avoid school. *See The Safe School Study Report to the Congress*, Executive Summary, *supra*, at 116. The crux of this case is not possession as such but rather where firearms may be possessed. Schools and their environs are not the place. Considering the educational and social costs of non-attendance at school and the impact on students who do attend unsafe schools, more is at issue than simple firearms possession.

There is little doubt that a disease affecting the percentages of staff and students that are affected by the possession and use of firearms in and around schools would be considered a national crisis. It is clear that firearms violence is a national public health problem. *See* M. Rosenberg, P. O'Carroll and K. Powell, *Let's Be Clear: Violence Is A Public Health Problem*, 267 JAMA 3071 (1992). It denies educational opportunity. A. Novello, Surgeon

General, *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3007 (1992). It is a matter properly addressed by Congress by enactment of the Gun-Free School Zones Act of 1990.

D. FINDINGS AND EVIDENCE WERE NOT REQUIRED TO SUPPORT ACT

Despite its invalidation of the Gun-Free School Zones Act of 1990, the Fifth Circuit did suggest that under some circumstances the Commerce Clause could support such a measure. Instead, the Fifth Circuit objected to the lack of some "finding, legislative history, or evidence" justifying its enactment. *Lopez, supra*, 2 F.3d at 1366. This rationale was appropriately rejected by the Ninth Circuit in *Edwards, supra*, which found (citing previous cases of this Court) that particularized findings are not required.

To the extent that legislative history is required to support the Gun-Free School Zones Act of 1990 under the Commerce Clause, such history does not depend upon isolated findings. As in *Garcia, supra*, the "longstanding" federal role in education may be considered. *Garcia, supra*, 469 U.S. at 552. Also, Congressionally initiated studies, such as *The Safe School Study Report to the Congress, supra*, are relevant.

The Gun-Free School Zones Act of 1990 may be bolstered by other legislative measures aimed at making schools safe and welcoming such as that enacted to create a "drug-free zone" around schools which was upheld by both the Fifth and Ninth Circuits. *See United States v. Crew*, 916 F.2d 980 (5th Cir. 1990); *United States v. Thornton*, 901 F.2d 738 (9th Cir. 1990). The Fifth Circuit noted in

Crew how neighborhoods may be held hostage by drug activity. *Crew, supra,* 916 F.2d at 984. Access to and use of firearms is closely associated with drug activity. *See, e.g., Urban High School Youth and Handguns: A School-Based Survey, supra,* at 3040 ("strongest associations with handgun access" include "selling drugs"). The Court should accept a Congressional pattern as sufficient history without special findings with respect to each element of that approach.

The Fifth Circuit puts an unnecessary procedural cart before the substantive horse. Under the circumstances, a substantial impact upon interstate commerce is established without further finding, legislative history, or evidence.

CONCLUSION

This case is significant because it limits the authority of Congress to undertake measures to help make schools safe and welcoming. Such authority does exist under the Commerce Clause. The Fifth Circuit should be reversed and the Gun-Free School Zones Act of 1990 upheld.

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IN THE

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OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

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Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Petitioner. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

Clarendon Foundation is a non-profit, non-partisan legal and educational foundation concerned with contemporary issues related to the Constitution and democratic government, particularly in the areas of federalism, state's rights and the Commerce Clause. Because this case raises questions of significance to Commerce Clause jurisprudence, we believe that our perspective will complement the briefs of the parties and assist the Court in resolution of these issues.

SUMMARY OF ARGUMENT

Section 922(q) is a valid exercise of congressional power under the Commerce Clause. The predicate for the lower court's contrary ruling -- that the absence of express congressional findings concerning the nexus between the proscribed conduct and interstate commerce rendered the statute unconstitutional -- is invalid. Acts of Congress are presumed constitutional until a reviewing court determines that the supposition of an interstate nexus has no "rational basis." Congress' deliberations as reflected either in formal findings or in other traditional sources of legislative purpose or intent, although these may facilitate judicial review, have no bearing on the lawfulness of the legislative act. That determination is strictly a matter of how the legislation would conform to the product of a reasonable legislature which had addressed overtly the question of an interstate nexus.

In this case, the rational-basis analysis takes place within the context of a nationwide epidemic of handgun violence with distinct reverberations throughout interstate commerce. Thus, the possession of a firearm in proximity to a public school is reasonably related to "commerce among the States." Once that determination is made, the principle of legislative independence precludes any second-guessing by the courts.

ARGUMENT

I. THE ABSENCE OF EXPRESS CONGRESSIONAL FINDINGS DOES NOT JEOPARDIZE THE CONSTITUTIONALITY OF SECTION 922(q).

1. When a court assesses the constitutionality of an Act of Congress, it assumes "'the gravest and most delicate duty that [it] is called on to perform'." *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980), *quoting Blodgett v. Holden*, 275 U.S. 142, 148 (1927). Even where the fundamental matters of federalism and state sovereignty are in play, and the case thus "calls for close examination" (*Fullilove, 448 U.S. at 472*), a court is "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution" (*ibid.*) to execute enumerated powers affecting the national interest. *See Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973); *Cleland v. National College of Business*, 435 U.S. 213 (1978). Because the judiciary is testing not merely "a choice made by a single judge or a school board, but ... a considered decision of the Congress and the President" (*Fullilove*, 448 U.S. at 473), the courts must accord "great weight" (*ibid.*) to legislative judgments.

Complementing this principle of deference is the venerable presumption that acts of Congress are constitutional. *FCC v. Beach Communications*, 113 S.Ct. 2096, 2102 (1993); *Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988). Thus, "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Concrete Pipe and Products of Calif., inc. v. Construction Laborers Pension Trust for S. Calif.*, 113 S.Ct. 2264, 2282 (1993); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830).

2. The Commerce Clause, Art. I, Sec. 8, cl. 3, is the direct source of perhaps the most important powers which the Federal Government exercises in peacetime. The determinative test of the exercise of this power is whether the activity sought to be regulated affects commerce "among the several States" and "has a real and substantial relation to the national interest." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255 (1964). Whether a statute proscribes an activity genuinely affecting commerce is, in the first instance, the judgment of Congress.

Legislative purpose or intent may be gleaned from findings formally incorporated into the statute. If Congress makes such findings, they carry substantial weight in a court's analysis. *Perez v. United States*, 402 U.S. 146, 156 (1971). However, Congress "need not make particularized findings" (*id.*) that a class of activity affects interstate commerce. If no formal findings accompany the legislation, other sources of legislative intent such as committee or conference reports, floor debates, Members' speeches, or hearings typically are reviewed in assessing whether the challenged activity has an interstate effect.

In certain instances, as in this case, there is a lack of express data as to the process and authority by which Congress ultimately adopted the legislation. Nevertheless, "[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Miller*, 333 U.S. 138, 144 (1948); *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18 (1983). "[B]ecause we never require a legislature to articulate its reasons for enacting a statute" (*Beach Communications*, 113 S.Ct. at 2102), Congress was not required to state explicitly that it was acting pursuant to the Commerce Clause when it enacted Section 922(q).

Regardless of the extent to which Congress has made specific findings, the pivotal inquiry in Commerce Clause analysis is whether the legislative act has "a rational basis." *Federal Energy Regulatory Com'n v. Mississippi*, 456 U.S. 742, 756 (1982). *See also Hodel v. Virginia Surface Mining & Recl. Assn., Inc.*, 452 U.S. 264, 277 (1981); *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981). As the Ninth Circuit put the point in *United States v. Edwards*, 13 F.3d 291 (1993), the courts consider whether a "reasonable Congress" could find that the class of activity regulated affects interstate commerce *(id.* at 295); that is, whether Congress properly could have found a sufficient nexus had it sought to do so. *See Perez v. United States*, 402 U.S. 146, 152-156 (1971). Courts may invalidate legislation enacted under the Commerce Clause *"only if* ... there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel v. Indiana*, 452 U.S. at 323 (emphasis added).

In this case, the Fifth Circuit acknowledged the scope of the Commerce power, and the principles of deference and presumption of constitutionality. *United States v. Lopez*, 2 F.3d 1342, 1360, 1364 (1993). Nevertheless, the court invalidated Section 922(q) because of the absence of "express or implied congressional findings" (*id.* at 1357) regarding the effect on interstate commerce of the acts proscribed by the statute, *i.e.*, the possession of a firearm within 1,000 feet of a public school. In the lower court's view, Congress had "not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause." *Id.* at 1365-66.

Notwithstanding this Court's pronouncements that express findings are not required to sustain an exercise of powers delegated to Congress in the Commerce Clause, the Fifth Circuit ruled that "[c]ourts cannot properly perform their duty to determine if there is any rational basis for a

congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding." *Id.*, 2 F.3d at 1363-64. The lower court reasoned, in effect, that the presumption of constitutionality attaching to Section 922(q) is fatally undermined in the absence of explicit congressional findings linking handgun possession to commerce.

3. The essential *fallacy* in the Fifth Circuit's argument is that this type of structure -- legislative action supported by legislative findings -- is crucial in order for a court to resolve a Commerce Clause challenge in favor of constitutionality. The presumption of constitutionality attaching to statutes persists regardless of the extent to which a specific interstate nexus is identified. As is illustrated well by the Fifth Circuit's survey of firearms legislation over the past fifty years (*Lopez*, 2 F.3d at 1348-1360), different pieces of legislation come packaged differently. The degree to which a statute is accompanied by explanatory findings of impact on commerce bears on the ease with which a reviewing court may uphold the statute, but it does not *eo ipso* affect the statute's constitutionality. This is the point of the Ninth Circuit's statement in *Edwards*, 13 F.3d at 295, that if Congress does make such findings, they carry "great weight" and the "reviewing court's responsibility to determine whether a reasonable Congress would have found such a nexus is simplified." *Ibid.* But this is not to say that if express or direct findings are absent, the statute's constitutionality is suspect.

For this reason, the rule of reasonableness invoked by the Ninth Circuit in *Edwards*, as that court implicitly recognized, is transitive: It applies whether or not formal findings of commercial impact accompany the legislation; whether other indicia of legislative reflection upon the point are found; or indeed, whether the statute and the "legislative history" are silent. In any of these scenarios the determi-

native question is one of rationality: Do extant findings have a rational basis, or, where there are no such findings, would a reasonable Congress find that the class of activity regulated affects interstate commerce? The reviewing court is thus tasked with "discern[ing] some legislative purpose or factual predicate that supports the exercise of that power" (*EEOC v. Wyoming*, 460 U.S. at 226 n. 18), were that exercise rationally undertaken. Or put differently, would Congress have ascertained a nexus with commerce had it explicitly addressed the question?

To see clearly the error of the Fifth Circuit's premise that the presence or absence of legislative findings affects constitutionality, one need only consider the analytical underpinning of such an approach. To hold that a statute is constitutional only when it is accompanied by explicit findings limits the statute's validity to what the legislators specifically had in mind when they enacted it. But legislators in drafting statutes may *not* have in mind all possible constitutional predicates or all possible applications of the law. Hence, "to apply the law only in ways the legislators actually thought of not only seems to be too restrictive, but may also result in less than what the legislators want these laws to achieve." W Lee, "Statutory Interpretation And The Counterfactual Test For Legislative Intention," 8 *Law And Philosophy* 383, 389 (1989). It is also possible, in a given case, that Congress may have been purposefully silent, for "'Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on commerce'." *Perez, supra*, 402 U.S. at 152, *citing United States v. Darby*, 312 U.S. 100, 120-21 (1941).

The approach followed by the Ninth Circuit in *Edwards* is more workable. A statute should be interpreted to accomplish what Congress would have done had it treated the question squarely. This is an objective approach to

congressional intent (what Congress is reasonably likely to have done) not limited to what legislators actually thought. "The search is for manifested meaning -- not unmanifested intent." R. Keeton, JUDGING 150 (1990). In other words, a "court should "[d]efer to the statute's manifestations of principle and policy, as far as they can be ascertained." *Id.* at 151. *See also*, F. Easterbrook, "Text, History, And Structure In Statutory Interpretation," 17 *Harv. J. Law & Pub. Policy* 61-64 (1994)("We use our knowledge of the times in which texts were written to deduce purposes, goals, objectives, and values of the drafters."); *and* R. Dworkin, LAW'S EMPIRE 217, 219, 314 (1986).

In this sense, the analysis is no different from rational-basis review in other contexts. Because a legislature is not required to articulate its reasons for enacting a statute, "it is entirely irrelevant for constitutional purposes whether the conceived [rationale] ... actually motivated the legislature." *Beach Communications*, 113 S.Ct. at 2102. Thus, "the absence of 'legislative facts on the record' has no significance in rational-basis analysis." *Ibid.* This is a fundamentally pragmatic consideration: "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Ibid.* (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973).

Accordingly, contrary to the Fifth Circuit's theory, the lack of direct or explicit findings in Section 922(q) does not render the statute constitutionally deficient, so long as a reasonable basis for a nexus between the proscribed conduct and commerce can be discerned.

II. THERE IS A REASONABLE BASIS FOR FINDING A CAUSAL NEXUS BETWEEN THE CONDUCT PROSCRIBED IN SECTION 922(q) AND INTERSTATE COMMERCE.

1. Little divination is required to recognize that Congress in this case invoked its Commerce power in order to cope with a current condition of enormous federal consequence. Handgun violence is taking a ghastly toll on American society. In 1991 alone, over 24,000 people were murdered in the United States, principally by means of handguns. Our country has been characterized as "the only modern industrial urban nation that persists in maintaining its gun culture." M. Boser, "An Analysis Of Washington, D.C.'s Assault Weapon Manufacturing Strict Liability Act," 25 *Colum. J. L. & Soc. Probs.* 313 (1992). And the problem is burgeoning. Between 1960 and 1980, the death rate from homicide by firearms increased 160 percent, corresponding directly to the simultaneous growth in gun ownership. Increased firearm possession leads to more homicides for the simple reason that "firearms make death a more likely consequence of violence." *Ibid.* In short, Section 922(q) is a legislative response to a virtual epidemic. The matter thus "has a real and substantial relation to the national interest" (*Heart of Atlanta Motel*, 379 U.S. at 255), as required for "rational-basis" analysis to proceed.

This state of affairs provides the obvious frame of reference in which to test the rational basis of the proposition that Congress meant to act pursuant to the Commerce power in legislating Section 922(q) and that its action was lawful. In such a context -- where the cumulative effects of widespread firearms violence, the public welfare, and our national economy are facets of American society so complexly interconnected -- we could well expect a "reasonable Congress" (*Edwards*, 13 F.3d at 295) to respond with legislation

the likes of Section 922(q). Framing the analysis this way provides a coherent fit between an identified evil and the congressionally-fashioned response to it. As demonstrated in Section I, *supra*, the fact that this legislation may not have been associated with express findings of an impact on commerce does not, in any way, disturb this fit.

The rational basis of the legislative response in this case is solidified further because there have been ample findings made over time by Congress concerning the impact of firearms on the national economy -- findings the Fifth Circuit traced meticulously in its opinion. *See Lopez*, 2 F.3d at 1348-1360. This long-term institutional reflection upon the national effects of firearms abuse provides "a predicate that supports the exercise" of the Commerce power. *EEOC v. Wyoming*, 460 U.S. at 226 n. 18.

In this connection, Justice Powell's observation in *Fullilove, supra*, has particular pertinence: "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Id.*, 448 U.S. at 503 (Powell, J., concurring). Because Congress has frequently relied upon the Commerce Clause as authority for the enactment of statutes regulating the use and possession of firearms, it "was not required to conduct additional hearings and make new findings which would merely repeat its prior findings concerning the detrimental effect of firearms." *Edwards*, 13 F.3d at 294. Rather, the legislature's statutory response here is an appropriate resolution of what Congress has, for decades, deemed to be a national problem of the first order. *Cf. Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) ("The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the

evidence as to the effect of such practices on other aspects of commerce, a crucial matter.")

2. Nor is the lower court's concern with the local nature of the proscribed conduct valid. The denomination of an activity as "local" or "intrastate" does not in itself resolve the question whether Congress may regulate it under the Commerce Clause. The commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). *See also Fry v. United States*, 421 U.S. 542, 547 (1975); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)

This conclusion is strengthened by prior Supreme Court decisions which upheld legislation enacted pursuant to the Commerce Clause designed to regulate purely intrastate activities which affect interstate commerce. *See, e.g., Wrightwood Dairy Co.*, 315 U.S. at 118-19 (Congress is permitted to regulate the price of milk sold intrastate because of resulting competitive effect upon milk sold interstate); *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (Congress is permitted to regulate home grown wheat consumption because of its effect on interstate commerce); *Huddleston v. United States*, 415 U.S. 814, 833 (1974) (Congress is permitted to regulate intrastate redemption of firearms from pawnshops on the basis that such transactions affect interstate commerce).

Accordingly, it is reasonable to conclude that the violence created through the possession of firearms adversely affects the national economy, notwithstanding the local nature of the activity in the particular case. As this Court has said,

"[t]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, ... which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta Motel*, 379 U.S. at 258. Therefore, Congress acted reasonably to regulate the possession of firearms pursuant to the Commerce Clause in enacting Section 922(q). Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1981).

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

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AMICUS BRIEF SUPPORTING NEITHER PARTY

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No. 93-1260

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

VS.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ Of Certiorari to the Court of Appeals for the Fifth Circuit

AMICUS BRIEF ON BEHALF OF: ACADEMICS FOR THE SECOND AMENDMENT; SECOND AMENDMENT FOUNDATION; CONGRESS OF RACIAL EQUALITY; NATIONAL ASSOCIATIONS OF CHIEFS OF POLICE AND AMERICAN FEDERATION OF POLICE

AMICUS BRIEF SUPPORTING NEITHER PARTY

INTEREST OF THE AMICI

Both parties in this appeal have graciously consented to the filing of this brief which supports the position of neither party.

1. Amicus ACADEMICS FOR THE SECOND AMENDMENT

ACADEMICS FOR THE SECOND AMENDMENT (A2A) is a not for profit Minnesota corporation headquartered in St. Paul, MN. A2A fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical scholarship on the topic and stimulating greater public knowledge and understanding of such scholarship. A2A's specific activities have included the circulation of open letters and other materials among scholars and the sponsorship of scholarly meetings, e.g. one held in connection with the 1994 annual meeting of the American Association of Law Schools in Orlando, FL. Current members of the A2A board are law professors Joseph E. Olson (Hamline), Robert J. Cottrol (Rutgers) and James Viator (Loyola-New Orleans).

Many, but not all, of the signatories of this brief are A2A members.

2. Amicus CONGRESS OF RACIAL EQUALITY

The CONGRESS OF RACIAL EQUALITY (CORE), a nationwide civil rights organization founded in 1942 which enjoys consultative status at the United Nations, is a New York not-for-profit corporation. CORE's first priority is to oppose discrimination in every aspect of American life. In that connection, CORE is well aware that racist motivations often underlie anti-gun laws and have underlain them from colonial times through the present.[1]

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[1] *See, e.g.* the following (all authored or co-authored by authors of the present brief): Cottrol and Diamond, " 'Never Intended to be Applied to the White Population': Firearms Regulation and Racial Disparity, The Redeemed South's Legacy to a National Jurisprudence?" forthcoming in CHICAGO-KENT L. REV. (1995); Cottrol and Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration",

CORE also seeks to rid the Black Community of pathologies afflicting it as a result of slavery and the subsequent century of racial discrimination. Among the most devastating of those pathologies is crime; another is drug abuse. CORE operates programs to prevent drug abuse and to assist the Black community in fighting it and crime in general. CORE has involved itself in the fight against these pathologies because they are the scourge of Black neighborhoods.

CORE joins this amicus brief because of its belief that law abiding responsible adults who are threatened and victimized by crime have the right of lawful self-defense, including the right to possess the arms necessary thereto. CORE encourages law abiding, responsible adults to organize their communities against drug trafficking and insist on police action against drug dealers wherever and whenever they violate our laws. Necessarily the law abiding Black who takes such steps while living in a high crime area becomes a victim of threats and retaliation. Even if the police are not hostile to such a victim because of his/her prior pressure for arrests, the police cannot bodyguard him/her. In this situation it seems not unreasonable for the victim to want weapons to defend his/her home and family comparable to those that might be used to attack them.

3. Amicus NATIONAL ASSOCIATION OF CHIEFS OF POLICE

The NATIONAL ASSOCIATION OF CHIEFS OF POLICE represents over 11,000 command level law

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80 GEORGETOWN L.J. 309 (1990); Kates, "Toward a History of Handgun Prohibition" and Kates and Salter, "The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect" in D. Kates (ed.) RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT (1979). *See also* S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984).

enforcement officers on the federal, state and local levels nationwide. Its president is Dennis Ray Martin, formerly Chief of Police of Elbee-Maple Grove Township, MI. Its offices are located at 3801 Biscayne Blvd., Miami, Florida 33137, telephone (305)

The ASSOCIATION's interest in the potential Second Amendment issue in this case is based on the ASSOCIATION's belief that the widespread dispersion of arms among the responsible, law abiding adult population deters crime. Moreover, the Association supports the preservation the armed citizenry-cum-unorganized militia system for personal defense because armed citizens and the "unorganized militia" constitute the only effective assistance potentially available to the police when the Army and National Guard are unavailable, e.g. when they are called overseas as they were in World Wars I and II and in the Persian Gulf War.

4. Amicus AMERICAN FEDERATION OF POLICE

The American Federation of Police represents 103,000 rank and file law enforcement officers, security personnel, and citizen crime-watch volunteers. The Federation's major activities involve training on-the-beat patrol officers. Gerald S. Arenberg is Exec. Director. Headquarters are 3801 Biscayne Blvd., Miami, Florida 33137, telephone (305) 573-0202. Its interest in this case is identical to that of amicus NATIONAL ASSOCIATION OF CHIEFS OF POLICE.

5. Amicus SECOND AMENDMENT FOUNDATION

The Second Amendment Foundation, a Washington nonprofit corporation with its headquarters in Bellevue, Washington, is classified as a tax-exempt educational organization under § 501(c)(3) of the Internal Revenue Code and as a public foundation under §§ 170(b)(1)(A)(vi) and

509(a)(1). It works to secure, preserve and expand the right to keep and bear arms.

DISCUSSION

Amici take no position on the correctness of the decision below. Their concern is only to emphasize what this case does not — indeed, could not — concern. As the court below noted, while "some applications of section 922 (q) might raise Second Amendment concerns[, appellant] Lopez does not raise the Second Amendment and thus" the court below did not consider it.[2]

Amici wish to emphasize that even had appellee desired to raise the Second Amendment, he was in no position to do so. For the reasons detailed *infra*: a) the Amendment guarantees an individual right to choose to possess small arms, but b) that guarantee is only to **responsible adults.** It does not accrue to children, felons or the insane. Neither, we hasten to add, does the Second Amendment encompass a right of anyone to keep, carry, or transfer arms for nefarious purposes such as murder, robbery and so forth.

I. THE SECOND AMENDMENT GUARANTEES LAW-ABIDING, RESPONSIBLE ADULTS A PERSONAL RIGHT TO POSSESS ARMS

A. The individual right view is endorsed by the overwhelming majority of modern scholars.

Innumerable politically based pronouncements in non-scholarly sources claim that the Second Amendment does not guarantee a right of individuals, but guarantees only the states' right to arm their militias. That position (which we shall call the "states' right-only" view) is rejected by the great majority of modern legal scholars, *inter alia* because

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[2] *United States v. Lopez*, 2 F.3d 1342, n. 46 (5th Cir. 1993).

the very concept of the Second Amendment as a states' right was completely unknown to the authors of the Bill of Rights (hereinafter described as the Founders or the Founding Fathers).

Of 41 law review articles published since 1980 which offer substantial discussion of the Amendment, just four take the states' right-only position. Their quality does not exceed their quantity: Three of the four articles were written by employees of anti-gun lobbying groups, the fourth by a politician; all appear in minor reviews and **none** were published on their merits — each being in a symposium in which anti-gun groups and/or individuals were invited to submit articles detailing their position.[3]

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[3] Ehrman and Henigan, "The Second Amendment in the 20th Century: Have You Seen Your Militia Lately", 15 U. DAYTON L. REV.5 (1989) and Henigan, "Arms, Anarchy and the Second Amendment", 26 VALPARAISO U. L. REV. 107 (1991) — both written by general counsel of Handgun Control, Inc.; Fields, "Guns, Crime and the Negligent Gun Owner", 10 N. KY. L. R. (1982) (article by non-lawyer lobbyist for the National Coalition to Ban Handguns); Spannaus, "State Firearms Regulation and the Second Amendment", 6 HAMLINE L. R. 383 (1983) (Minnesota attorney general).

In addition, see Beschle, "Reconsidering the Second Amendment: Constitutional Protection for a Right of Security", 9 HAMLINE L. R.69 (1986) (conceding that the Amendment does guarantee a right of personal security, but arguing that that can constitutionally be implemented by banning and confiscating all guns). A somewhat equivocal position is taken in Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L.J. 551 (1991) (the Amendment is an individual right but may not be applicable to present in which only one half of households are armed since its purpose was to insure that the entire populace would be armed).

The article count we have given does not include three other articles: two by authors who disapprove of the constitutional right to arms, but do not seem to deny its existence, Powell, "Capital Punishment, 102 HARV. L. REV. 1035, 1045 (1989) and Brown, "Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's 'The Embarrassing Second Amendment' " 99 YALE L. J. 661 (1989);

In contrast, articles accepting the Amendment as an individual right are published on their own merits and in top rank law reviews.[4] The authors include outstanding liberal

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and a third article which simply catalogs the contending positions taken by each side, Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective" 59 U. CHI. L. R. 453 (1992).

[4] [THROUGHOUT THIS BRIEF ARTICLES WRITTEN BY SIGNATORIES OF THIS BRIEF ARE MARKED WITH AN ASTERISK] Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236 (1994), Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992); *Kates, "The Second Amendment and the Ideology of Self-Protection" 9 CONST. COMM. 87 (1992); *Cottrol & Diamond, "The Second Amendment: Toward an AfroAmericanist Reconsideration", 80 GEORGETOWN L.J. 309 (1991); Amar, "The Bill of Rights as a Constitution", 100 YALE L. J. 1131, 1164ff. (1990); Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637 (1989); *Kates, "The Second Amendment: A Dialogue", 49 LAW & CONTEMP. PROBS. 143 (1986); Malcolm, Essay Review, 54 GEO. WASHINGTON U. L. REV. 582 (1986); Fussner, Essay Review, 3 CONSTITUTIONAL COMMENTARY 582 (1986); Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986); Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986); *Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH. L. REV. 203 (1983) (hereinafter described as "Original Meaning); *see also* Scarry, "War and the Social Contract: The Right to Bear Arms", 139 U. PA. L. REV. 1257 (1991); Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L. J. 551 (1991).

The remainder of the 37 individual right articles are in less prestigious law reviews: *Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution", forthcoming in 61 TENN. L. REV. # 2 (Winter, 1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution), Halbrook, "Rationing Firearms Purchases and the Right to Keep Arms" 96 W. VA. L. REV. 1 (1993); Comment: "Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to keep and Bear Arms?" 37 VILLANOVA L. REV. 1407 (1992); Halbrook, "The

Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment", 26 VALPARAISO L. REV. 131 (1991); Tahmassebi, "Gun Control and Racism", 2 GEO MASON CIV. RTS.L. J. 67 (1991); Bordenet, "The Right to Possess Arms: the Intent of the Framers of the Second Amendment", 21 U.W.L.A. L. REV. 1 (1990); Moncure, "Who is the Militia — The Virginia Ratifying Convention and the Right to Bear Arms", 19 LINC. L. REV. 1 (1990); Lund, "The Second Amendment, Political Liberty and the Right to Self-Preservation", 39 ALA. L. REV. 103 (1987); Morgan, "Assault Rifle Legislation: Unwise and Unconstitutional", 17 AM. J. CRIM. L.143 (1990); Dowlut, "Federal and State Constitutional Guarantees to Arms", 15 U. DAYTON L. REV. 59 (1989); Halbrook, "Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 U. DAYTON L. REV. 91 (1989); Hardy, "The Second Amendment and the Historiography of the Bill of Rights", 4 J. LAW & POLITICS 1 (1987); Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment", 9 HARV. J. LAW & PUB. POLICY 559 (1986); Dowlut, "The Current Relevancy of Keeping and Bearing Arms", 15 U. BALT. L. FOR. 32 (1984); Malcolm, "The Right of the People to Keep and Bear Arms:The Common Law Tradition", 10 HAST. CONST. L. Q. 285 (1983); Dowlut, "The Right to Arms", 36 OKL. L. REV. 65 (1983); Caplan, "The Right of the Individual to Keep and Bear Arms" 1982 DET. COLL.L. REV. 789; Halbrook, "To Keep and Bear 'Their Private Arms' ", 10 N. KY. L. REV. 13 (1982); A. Gottlieb, "Gun Ownership: A Constitutional Right" 10 N. KY. L. REV. 138 (1982); Gardiner, "To Preserve Liberty — A Look at the Right to Keep and Bear Arms", 10 N. KY. L. REV. 63 (1982); Note, "Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?", 21 WASHBURN L.J. 244 (1982); Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 GEO MASON L. REV. 1 (1981).

The following treatments in book form also support the individual right position is correct: J. Malcolm, "ARMS FOR THEIR DEFENCE": THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard U. Press, 1994); *R. Cottrol, GUN CONTROL AND THE CONSTITUTION (Garland, 1993); *Cottrol & Diamond, "Public Safety and the Right to Bear Arms", in D. Bodenhamer & J. Ely, AFTER 200 YEARS; THE BILL OF RIGHTS IN MODERN AMERICA (Ind. U. Press, 1993); *OXFORD COMPANION TO THE UNITED STATES SUPREME COURT (Oxford U. Press,

constitutional scholars such as Akhil Amar, Sanford Levinson and William Van Alstyne — none of whom own guns or expected that the evidence would force this position on them. In his just published piece, Prof. Van Alstyne, a former member of the ACLU national board, describes the individual right/states' right-only debate as being between those who take the Bill of Rights seriously and those who do not.[5]

1992) (entry on the Second Amendment); E. Foner & J. Garrity, READER'S COMPANION TO AMERICAN HISTORY 477-78 (Houghton Mifflin, 1991) (entry on "Guns and Gun Control"); *Kates "Minimalist Interpretation of the Second Amendment" in E. Hickok (ed.), THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (U. Va. Press, 1991); S. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (Greenwood, 1989); L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (Macmillan, 1988); D. Hardy, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT (Blacksmith,1986); *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Macmillan, 1986) (entry on the Second Amendment); S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" and Halbrook, "The Second Amendment as a Phenomenon of Classical Political Philosophy" — both in D. Kates (ed.), FIREARMS AND VIOLENCE (1984); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., RIGHT TO KEEP AND BEAR ARMS (1982).

[5] Van Alstyne, 43 DUKE L. J. *supra* at 1254-5. Compare Professor Levinson's analysis: If the Second Amendment is to be read out of the Constitution "in the name of social prudence . . . why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they

B. The text of the Second Amendment clearly guarantees an individual right ("right of the people").

The Amendment describes the right to arms as a "right of the people." As this Court has noted, throughout the Constitution that phrase denotes citizens and their rights against government. *United States v. Verdugo-Urquidez* 494 U.S. 259, 108 L.Ed. 2d 222, 232-33 (1990). Accordingly, "right of the people" is to be construed *in pari materia* in the First, Second and Fourth Amendments. *Id.* Not to construe it *in pari materia* would imply the absurd conclusion: that when Congress drafted the Bill of Rights it used "right of the people" in the First Amendment to mean an individual right; but sixteen words later, it used the same phrase in the Second Amendment to mean a right of the states; but, forty-six words later, the Fourth Amendment used it to mean an individual right, as the Ninth Amendment does also; and then the Tenth Amendment specifically distinguishes "the states" from "the people," even though in the Second Amendment they are identical.

(If the foregoing were not absurd enough, consider the implications were the same nonsensical construction to be applied to the requirement that the House of Representatives shall be selected "by the people of the several states." Constitution, Art. I, § 2, cl. 1. If what "people" actually means is "state", it would seem to follow that the state legislature or Congress would be free to decree that the states' House delegations are to be appointed by the state legislature rather than popularly elected. This would, of course, abrogate the purpose of the House of Representatives by undermining the system established by the original

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are. . . . 'Cost-benefit' analysis, rightly or wrongly, has come to be viewed as a 'conservative' weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play." 99 YALE L. J. *supra* at 657-58.

Constitution whereby the House was to be elected by popular vote and the Senate by the state legislatures.)

It bears emphasis that the linkage between the First, Second and Fourth Amendments goes beyond their common usage of the phrase "right of the people." It has been suggested that both conceptually and for specific historical reasons, the Founding Fathers saw the First through Fourth Amendments as closely linked substantive rights — all revolving around the right to arms. *9 CONSTITUTIONAL COMMENTARY 98-103. In fact, the Fourth Amendment maxim that a man's home is his castle originated in cases recognizing the right to use deadly force to repel burglars and arsonists.[6]

C. The very concept of a states' right-only is an anachronism — a concept unknown to the authors of the Bill of Rights.

The very concept that the Second Amendment could be a states' right is an invention of our own Century's gun control debate. The text and the legislative history demonstrate that the Founding Fathers had not even the remotest inkling of such a states' "right" concept, whether in connection with the Amendment, or otherwise. So, for instance, when the Tenth Amendment guarantees prerogatives of the states against federal interference, they are referred to as "powers", not "rights." And the Second Amendment right is not only to keep, but also to "bear" arms. Only individuals "bear" arms. States do not.[7]

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[6] *See Payton v. N.Y.*, 445 U.S. 573, 596, n. 44 (1980) citing *Semayne's Case* and see discussion of other medieval cases to the same effect in *"Original Meaning", 82 MICH. L. REV. *supra* at n. 5.

[7] Prof. Van Alstyne approvingly quotes (43 DUKE L. J. 1243, n. 19) a leading anaylst of the Amendment's history: " 'If anyone entertained [the states' right-only view] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most

Moreover, Congress had before it when it voted on the Bill of Rights a commentary on them by the Federalist writer Tench Coxe; that commentary, **which was specifically endorsed by James Madison, author of the Bill of Rights,** defined the purpose of the Second Amendment as to guarantee people against the confiscation of "their *private* arms."[8]

Significantly, Madison's own proposal for integrating the Bill of Rights into the Constitution was not to add them at the end (as they have been) but to interlineate them into the portions of the original Constitution they affected or to which they related. If he had thought the central purpose of the Second Amendment revolved around the militia he would have interlineated it in Art. I, § 8, near or after cl. 16. Instead, he planned to insert the right to arms with freedom of religion, the press and other personal rights in § 9 following the rights against bills of attainder and ex post facto laws.[9]

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closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.' " (S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT *supra* at 83). *See generally*, J. Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard U. Press, 1994), ch. 8.

[8] Emphasis added. The commentary appeared in Federalist newspapers around the nation, including those in Philadelphia where Congress was then sitting. *See* •"Original Meaning," 82 MICH. L. REV. *supra* at 223-4; the commentary's full discussion of the Second Amendment reads: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article [i.e., amendment] in their right to keep and bear their private arms." *Id.*

[9] •"Original Meaning", 82 MICH. L. REV. *supra* at 223.

As recently as *Planned Parenthood v. Casey*, ____ U.S. ____, 120 L.Ed.2d 674, 696 (1992) this Court has listed the Second Amendment interchangeably with other explicitly guaranteed personal rights.[10] This follows the precedent of the Founders who themselves routinely made the same connection, linking the right to arms with freedom of religion and speech, etc. under such joint descriptions as "private rights", "human rights", "essential and sacred rights" (quoting Madison, Monroe and Gallatin respectively).[11]

Nineteenth Century Americans were equally unaware of even the concept that the right to arms might be a state's right. From the debate on the Fourteenth Amendment and the precedent Civil Rights Act of 1866, their modern historian concludes:

> the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and to bear arms.[12]

19th Century legal and constitutional commentary on the Amendment is epitomized by Justice Story's description of

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[10] In *Moore v. East Cleveland*, a plurality opinion had previously quoted the second Justice Harlan in listing "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" as part of the "full scope of liberty" guaranteed by the Constitution. 431 U.S. 494, 502 (1976), quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

[11] For these and numerous other quotes from the 1787-91 debates see "'Original Meaning", 82 MICH. L. REV. *supra* at 223-24 and 228-9, citing original sources.

[12] M. Curtis, NO STATE SHALL ABRIDGE 104 (Duke University Press, 1986); see pp. 52, 53, 56, 72, 88, 140-1 and 164 for debate extolling the right to arms or equating it to free expression, religious liberty, due process, jury trial and against unreasonable search, etc., etc.

it as "The right *of the citizens* to keep and bear arms"[13] and his explanation of its purposes as follows: "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms."[14]

The closest any 19th Century source comes to recognizing even the concept of a states' right is the following **denial** offered by the pre-eminent 19th Century commentator, Thomas Cooley, under the heading "The right is General":

> It may be supposed from the phraseology of [the Second Amendment] that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for that purpose.[15]

To reiterate, the idea of the Second Amendment as something other (or less) than a guarantee of an individual right to arms is a purely 20th Century invention of which

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[13] Emphasis added. J. Story, COMMENTARIES ON THE CONSTITUTION 746 (1833).

[14] J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1st pub. 1833, repub., 1893). For other 19th Century constitutional commentators, please see: Prof. Levinson citing Thomas Cooley and Theodore Shroeder to the same effect, 99 YALE L. J. *supra* at 649-70); •"Original Meaning", citing St. G. Tucker (1803) and Rawle (1825) as 18th and 19th Century commentators who endorsed the individual right view without apparent consciousness that any other was possible (82 MICH L.REV. *supra* at 244-247); and •9 CONST. COMMENTARY 87, n. 1 (1992) citing Pomeroy (1868), von Holst (1885), Schouler (1897), J. Tucker (1899), Putney (1908) and Black (1910).

[15] T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-2 (2d ed., 1891, 1st pub. 1880).

prior generations — most especially including the Founders themselves — had no inkling.

D. This Court's decisions consistently treat the Second Amendment as a guarantee of individual right.

In several 19th Century cases this Court refused to enforce the Second Amendment against either the states or private citizens. These holdings were based on the 19th Century refusal to accept the application of any part of the Bill of Rights against the states. It bears emphasis, however, that the opinions' language indicates the Court's consistent recognition that the right to arms was and is an individual constitutional right, albeit one protected only against federal action.[16]

In *United States v. Miller,* 307 U.S. 174 (1939) this Court held that an indictment should not have been dismissed on the blanket theory that any law taxing and requiring registration of sawed-off shotguns violated the Second Amendment *ipso facto.* Partisans of the states' right-

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[16] *United States v. Cruikshank,* 92 U.S. 542, 553 (1875) dismissed an indictment charging that Klansmen deprived blacks of the right "of 'bearing arms for a lawful purpose.' This is [a pre-existing natural right,] not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen [from the Court's identical discussion of the First Amendment right of assembly; 92 U.S. at 552], means no more than that it shall not be infringed by Congress. This is one of the amendments [i.e. the Bill of Rights] that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes. . . ."; *Presser v. Illinois,* 116 U.S. 252, 265 (quoting the foregoing from Cruikshank and holding that neither the First nor Second Amendments apply against the states); *Miller v. Texas,* 153 U.S. 535 (1894) (same: Second and Fourth Amendments); *Robertson v. Baldwin,* 165 U.S. 275, 281-2 (1897) (addressing the Second Amendment indistinguishably from other guarantees of personal rights).

only view have misunderstood this as a holding that the only firearms the Amendment protects are those of the National Guard and/or organized state militias. Though that was what the Solicitor General argued,[17] this Court did not accept that argument — even though it was unopposed because no brief was filed on the other side.

Had the *Miller* court understood the Amendment to be a states' right only, it should, and presumably would, have disposed of the appeal on standing grounds. If gun ownership by ordinary citizens is not protected by the Amendment, Mr. Miller was not in a position to challenge the law under it. But this Court's treatment of the issues in *Miller* accepted that individuals do have standing to invoke the Second Amendment. Thus *Miller* focusses instead on the subsidiary issue of whether a law regulating sawed off shotguns affects the kind of firearms the Amendment protects individuals in possessing. Dealing therefore with Miller's challenge on its merits, the court held that only possession of military-type and/or militarily useful weapons is protected by the Amendment.[18] This holding is based on the Amendment's reference to a militia (which the Court expressly recognized included virtually the whole male pop-

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[17] "Second, the [Solicitor General Robert] Jackson brief argued that the right was a collective one that [only] protected the people when carrying arms as members of the state militia." *1 R. Cottrol, GUN CONTROL AND THE CONSTITUTION xxvii (Introduction) (NY Garland, 1993).

[18] 307 U.S. at 178. In adopting this standard *Miller* expressly cites a 19th Century Tennessee case in which it originated. For a discussion of the cases under the Tennessee Constitution and their relation to the Second Amendment, see *Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution", forthcoming in 61 TENN. L. REV. # 2 (Winter, 1994).

ulation[19]). Having fixed on this military-weapon standard, the court reversed because (for obvious reasons) Miller had not even made an attempt to show that, as a matter of fact, a sawed off shotgun is a military weapon. For equally obvious reasons, in abeyance of such a showing, this Court was not in a position to judicially notice that a sawed off shotgun is (or is not) a military weapon. 307 U.S. at 178.

Lest there be any misunderstanding, we hasten to add that the *Miller* standard is insufficient and significantly inadequate — in that it actually exaggerates the kind of weaponry the Amendment encompasses. Preservation of a militia composed of individually armed citizens was only a part of the Amendment's rationale.[20] The overall rationale was armed self-defense, particularly defense of home and

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[19] 307 U.S. at 179: "The signification attributed to the term 'militia' appears from the debates in the Convention, the history and legislation of the colonies and the states, and the writings of approved commentators. . .[:] all males physically capable of acting in concert for the common defense. . . . [O]rdinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." Emphasis added.

[20] *See, e.g.* Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986): The Amendment encompassed "two distinct principles: (1) Individuals had the right to possess arms to defend themselves and their property; and (2) states retained the right to maintain militias composed of these individually armed citizens.") and J. Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLOAMERICAN RIGHT 162-3 (Harvard U. Press, 1994): "The Second Amendment was meant to accomplish two distinct goals. . . . First, it was meant to guarantee the individual's right to have arms for self-defense and self-preservation. . . . These privately owned arms were meant to serve a larger purpose [militia service] as well . . . and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public . . . the militia [being] . . . the body of the people."

family.[21] That rationale substantially limits the kind of weaponry which might otherwise fall within *Miller*'s holding that the Amendment protects militia-type weaponry. Today

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[21] Not only was this the most basic of natural rights, the possession of arms for that purpose was regarded as basic to the virtue, the **moral** fortitude of a republican citizenry. The Founders "believed that the perpetuation of a republican spirit and character in their society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society." Shalhope, *supra*, 49 LAW & CONTEMP. PROBS. at 138. See generally *9 CONSTITUTIONAL COMMENTARY *supra* at 94-6: "Arms possession for protection of self, family and polity was both the hallmark of the individual's freedom and one of the two primary factors in his developing the independent, selfreliant, responsible character which classical liberal political philosophers deemed necessary to the citizenry of a free state.*** [π] The Anglo-American legal distinction between free man/armed and unfree/disarmed flowed naturally into the classical liberal view that the survival of free and popular government required citizens of a special character — and that the possession of arms was one of two keys in the development of that character. From Machiavelli and Harrington classical liberal philosophy derived the idea that arms possession and property ownership were the keys to civic *virtu*. In the Greek and Roman republics from whose example they took so many lessons, every free man had been armed so as to be prepared both to defend his family against outlaws and to man the city walls in immediate response to the tocsin warning of approaching enemies. Thus did each citizen commit himself to the fulfillment of both his private and his public responsibilities. [π] The very survival of republican institutions depended upon this moral (as well as physical) commitment — upon the moral and physical strength of the armed freeholder: sturdy, independent, scrupulous, and upright, the self-reliant defender of his life, liberty, family, and polity from outlaws, oppressive officials, despotic government, and foreign invasion alike. That the freeholder might never have to use his arms in such protection mattered naught. (Indeed, one basic tenet classical political theory took from its criminological premises was that of deterrence: if armed and ready, the free man would be least likely ever to actually have to defend. Simply to be armed, and therefore able to protect one's own, was enough; this moral commitment both developed and exemplified the character of the virtuous republican citizen.)"

as in the 18th Century, the basic arms with which one would defend home and family are the same as those with which one would render militia service: ordinary civilian small arms. But the concept of military-type arms could include kinds of arms which would be highly inappropriate for repelling a burglar or rapist: machineguns, bazookas, artillery and so forth. Both the text of the Second Amendment and its core purpose of protecting home and family suggest that while *Miller* is not incorrect as a limitation on the arms the Amendment protect, additional limitations exclude from that protection all but small arms (which must also be of military quality; for the implication that this excludes very cheap, shoddy firearms from the Amendment's protection see *"Original Meaning", 82 MICH. L. REV. *supra*, 260).

E. The implications of the states' right-only view cannot withstand examination.

Professor Van Alstyne actually understates the matter when he characterizes the individual rights vs. states' right-only debate as one between those who do take the Bill of Rights seriously and those who don't. In fact, advocates of the states' right-only view do not even take their own position seriously enough to explore its potential results — which turn out to be at least as socially adverse as those often attributed to the individual right view. In the individual right view the basis of the Second Amendment was the right to arms for personal defense, no distinction being made between apolitical and political crime.[22] Accordingly, as discussed *supra*, both the Amendment's text and the logic of the individual rights view limit the kind of weaponry the Amendment guarantees individuals to small arms only.

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[22] *9 CONSTITUTIONAL COMMENTARY *supra* at 89-103 citing examples and quoting and analyzing Locke, Sidney, Montesquieu, Blackstone, Madison, Jefferson, Paine and numerous others. See discussion and quotations in footnote 20 *supra*.

But the states' right-only view holds that the Amendment was intended to guarantee that states may equip their forces with arms sufficient to counterbalance the military force of the federal government. Thus any **honest**, conscientious treatment of the states' right-only view requires asking: Doesn't this position involve the conclusion that every state may, if it wishes, stockpile not just small arms but artillery, bombers, aircraft carriers, ICBMs and nuclear weapons for the use of its forces?[23] If the proponents of the states' right-only view have some **honest, principled** basis for a negative answer to the foregoing question, they have failed to offer it in their articles. Those articles "answer" such questions by ignoring them. States' right-only articles explore none of that view's implications beyond the naked claim that the Amendment does not preclude government from banning and confiscating all privately owned firearms.

A related question arises from the crucial difference between the two views in defining what "militia" means as that term is used in the Amendment. The individual rights

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[23] Space permits mentioning just one of the textual and logical limitations implicit in the individual view which are inapplicable to the states' right-only view. The Amendment guarantees the right to "keep *and bear* arms": Since an 18th Century man could not bear (i.e. pick up) cannon, the intent seems limited to small arms. By parity of reasoning it would not include even now-portable arms, like bazookas, because they are comparable in destructiveness to an 18th Century cannon.

But that limitation does not apply if the Amendment be deemed to create a states' right to possess military forces against the United States. If one can stomach the incongruity of describing a state as "bearing" arms, that state is obviously no more incapable of "bearing" cannon than any other kind of arms.

For a catalog of textual and logical limitations implied by the individual right view see, e.g. *"Original Meaning", 82 MICH. L. REV. *supra* at 259*ff.* (1983); *Kates, 49 LAW & CONTEMP. PROBS. *supra* at 146-8 and Halbrook, 49 LAW & CONTEMP. PROBS. *supra* at 157-60.

view rests on the preferred 18th Century meaning of "militia" — not some formal military unit, but a **system** under which each household was required to be armed and virtually every military-age male was required to own arms and appear for training and/or service when called to do so.[24] But in the states' right-only view the word "militia" refers to a formal military unit, a body of troops serving the state. Indeed, it is regularly asserted by partisans of that view that the "militia" is the National Guard, notwithstanding this Court's holding in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). But if these claims of the states' right-only analysts are correct, how can one escape the conclusions: a) that the Amendment repeals Art. I § 10, cl. 3, of the original Constitution which forbids states to "keep troops" without the consent of Congress; and b) that *Perpich* was wrongly decided, a cognate effect of the Amendment having been to modify Art. I, § 8, cls. 15 and 16 by exalting state power over the militia vis-a-vis federal?[25]

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[24] "Original Meaning", 82 MICH. L. REV. *supra* at 214-8 ("In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia." *Id.* at 215), Shalhope, 49 LAW & CONTEMP. PROB. *supra* at 133 ("Individuals had the right to possess arms to defend themselves and their property; and states retained the right to maintain militias composed of these individually armed citizens."). *See also* note 18 *supra* and Amar, 100 YALE L. J. *supra* at 1166 as quoted in note 25 *infra*.

[25] In fact, the concept of militia held by partisans of the states' right-only view is simply not the "militia" concept to which the Amendment refers: "Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but 200 years ago, any band of paid, semi-professional part-time volunteers, like today's Guard, would have been called 'a *select* corps' or '*select* militia' — and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms. . . . [So] 'the militia' is identical to 'the people'. . . ." Amar, *supra*, 100 YALE L. J. at 1166, emphasis in original. *See also*: J.

To reiterate, partisans of the states' right-only view have not even attempted to grapple with these questions. Though their articles purport to champion a states' right view, in fact it is just a makeweight — a disingenuous gibberish-concept which is presented without analysis of its content or implications solely to evade the inconvenient truth that the Amendment precludes the prohibition and confiscation of all firearms.

II. ALTHOUGH THE RIGHT ENCOMPASSES RESPONSIBLE ADULTS, NEITHER CHILDREN, FELONS NOR THE MENTALLY UNBALANCED HAVE ANY RIGHT TO ARMS UNDER THE SECOND AMENDMENT

While the constitutional right to arms extends to those who were exempt from mandatory performance of militia duties (women, seamen, clergymen and men beyond the upper age for service), it does not extend to those **excluded** from such service, i.e. felons, the insane and children.[26] Concomitantly, in

> classical republican political philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the "virtuous citizen." Free and republican

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Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162-3 (Harvard U. Press, 1994): "The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation. [Emphasis in original.]"

[26] It should be noted that those exempt from being called to militia duty (whether to drill, for police/watch purposes or for actual service in the field) were not thereby exempt from the militia laws' separate and independent requirement that every law abiding, responsible adult be armed: "the duty to keep arms applied to *every* household, not just those containing persons subject to militia service. Thus the over-aged and seamen, who were exempt from militia service, were required to keep arms for law enforcement and for the defense of their homes from criminals or foreign enemies." *"Original Meaning", 82 MICH. L.

> institutions were believed to be dependent upon civic *virtu* which, in turn, depended upon each citizen being armed — and, therefore, fearless, self-reliant and upright. Since possession of arms was the hallmark of a citizen's independence, the ultimate expression of civic *virtu* was his defensive use of arms against criminals, oppressive officials and foreign enemies alike. One implication of this emphasis on the virtuous citizen is that *the right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.*[27]

Felons, children and the insane were no more included in the right to arms than in the franchise, the two being "intimately linked" in the thinking of the Founding Fathers and prior and subsequent republican theorists.[28] *See also* discussion in "The Right to Arms", 36 OKL. L. REV. *supra* at 96 and of the same exclusion from state constitutional right to arms provisions in Dowlut & Knoop, "State Constitutions and the Right to Keep and Bear Arms", 7 OKLH. CITY U. L. REV. 177, n. 71 at p. 192 (1982).

REV. *supra*, 215-6 (citing laws requiring arms for all but magistrates and clergymen).

[27] Emphasis added: *Kates, "The Second Amendment: A Dialogue", 49 LAW & CONTEMP. PROBS. 143, 146 (1986). *See generally* Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986).

[28] Amar, 100 YALE L. J. *supra* 1164, at fn. 152; *"Original Meaning", 82 MICH L. REV. *supra* 232 at fn. 118; for examples *see* S. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 62-3, 108 (Greenwood, 1989).

Last, but certainly not least, the constitutional right to arms is the right to have them only for the purposes contemplated by the Amendment, such as self-defense, service in the militia and the *posse comitatus* and, incidentally, for other innocent purposes (target shooting, hunting, collection). Regardless of a person's age, there is no right to have, to carry or to transfer weapons for nefarious purposes such as murder, robbery, rape and so forth.

In sum, appellee Lopez herein could not have challenged Title 18 U.S.C. § 922(q) under the Second Amendment right to arms because that Amendment does not include children within its purview nor does it include the nefarious purposes which motivated appellee.

DATED: June 1, 1994.

Respectfully submitted,

_____

Don B. Kates

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No. 93-1260

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

United States of America,
Petitioner,

vs.

Alfonso Lopez, Jr.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief for the States of Ohio and New York and the District of Columbia as Amici Curiae in Support of Petitioner

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INTEREST OF THE AMICI CURIAE

The States that have joined this brief as amici curiae share the Federal government's stated interest in addressing the growing problems of violence, especially gun-related violence, in and around today's schools. The States welcome the efforts made in this area by federal law-enforcement personnel, which help to supplement the continuing efforts of state and local officials. These problems, encountered every day in schools throughout the country, appear to be growing in frequency and severity. They thus threaten to subvert order in the schools and to destroy the normal function of schools as places where children go to adjust to one another and to learn, rather than as places where disputes end in deadly violence and children must fear for their lives.

The amici States obtain many delinquency adjudications and criminal convictions each year stemming from incidents involving guns in and around schools. They also are developing novel strategies to cope with the pervasive problems raised by the presence of guns in and around schools, such as posting metal detectors at building entrances, conducting frequent searches of lockers and possessions, and undertaking extensive dispute mediation programs, all aimed at restoring confidence in the concept of schools as safe havens where children can learn without fear of deadly violence. But the simple fact is that these pervasive problems are challenging even the combined efforts of education personnel and state and local law-enforcement officers.

The amici States also have a direct interest in ascertaining the proper scope of the constitutional authority possessed by the Federal government in our federal system. At first blush, it may seem paradoxical that any State would file a brief in this case in support of the authority claimed by the Federal government here. But the amici States believe that the historical cooperation and coordination that has existed between the States and the Federal government in the area of law enforcement is both proper and important, and that these longstanding traditions of complementary

efforts should be approved and upheld in this case.

Finally, the validity *vel non* of the Gun-Free School Zones Act presents an issue of direct interest to the States, for two other reasons. First, the continuing battle against the easy movement and use of handguns is being pursued through the complementary and cooperative law enforcement efforts of the States and the Federal government, aimed at both the intrastate and interstate components of such traffic. Second, the successful prosecution of those who carry handguns into school zones for possible use there, whether such convictions occur under federal law or state law, is of immediate importance to the States, since almost all of those individuals are citizens of one or another State and since their activities are inimical to the public welfare in every State that is affected by their actions.

For all of these reasons, the amici States have a direct interest in the issues raised in this case and urge this Court to reverse the erroneous decision of the Fifth Circuit.

ISSUE PRESENTED

Whether the Gun-Free School Zones Act, 18 U.S.C. §922(q), which makes it unlawful to possess or discharge a firearm in a school zone, is a permissible exercise of congressional power under the Commerce Clause in Article I, Section 8 of the Constitution.

SUMMARY OF ARGUMENT

The close nexus between interstate commerce and protection of the public safety, such as by the regulation of firearms, is well established by prior congressional findings and by common reason. Prior congressional findings have conclusively demonstrated the close nexus between interstate commerce and crime legislation, especially with respect to laws regulating the possession and use of firearms. Indeed, the natural link between economic activity and protection of the public safety was widely recognized and accepted long before the Federal Constitution was ever ratified.

The court below erred in determining that Congress must make new and very particularized findings whenever it undertakes any further specific action in an area governed by prior legislation that was enacted within its proper authority. On the contrary, Congress is not required to reiterate or reinforce its previous findings establishing proper federal authority to legislate in an area each time it amends its prior statutes or undertakes any related initiatives in that same area. Indeed, if the courts can determine for themselves that such authority is properly invoked, then Congress need make no such express findings at all.

In general, the area of criminal law enforcement to protect the public safety, which is marked historically by close coordination and mutual assistance between the States and the Federal government, represents the nation's classic traditions of cooperative federalism. State and federal cooperation in this area,

which is desired by citizens and both sovereigns, should be permitted and encouraged by this Court. It should be recognized, moreover, that mutual accommodation of state and federal interests in the area of law enforcement serves the interests of the States as well as those of the Federal government.

ARGUMENT

The Court of Appeals for the Fifth Circuit held that 18 U.S.C. §922(q) is unconstitutional because it exceeds proper congressional authority under the Commerce Clause. It determined that Congress had made no explicit findings tying this statute to interstate commerce, that the statute could not be justified as a measure designed to promote or regulate interstate commerce in any way, and that the statute thus represented an impermissible intrusion into the constitutional realm of the States. Each of these conclusions, however, is incorrect.

I. THE CLOSE NEXUS BETWEEN INTERSTATE COMMERCE AND PROTECTION OF THE PUBLIC SAFETY, SUCH AS BY THE REGULATION OF FIREARMS, IS WELL ESTABLISHED BY PRIOR CONGRESSIONAL FINDINGS AND COMMON REASON.

An initial question in this case is whether there is any nexus in fact between statutory measures enacted to protect the public safety, such as measures to regulate firearms and the violence that often ensues from their possession and use, and Congress's express authority to regulate interstate commerce. Although the court below faithfully traced the historical development of congressional action regulating the transport and use of firearms, it made short shrift of any justifications for such laws. Yet there can be no doubt that a close nexus does exist between these two categories.

A. Prior Congressional Findings Have Shown the Close Nexus Between Interstate Commerce and Crime Legislation, Especially Laws Regulating the Possession and Use of Firearms.

Although criminal legislation enacted by Congress has a venerable history, federal measures to regulate criminal activities involving firearms date from the Depression era. These measures were devised as a partial and inadequate response to the extensive violence that flared up across the country with the expansion of organized crime during Prohibition. Two pieces of firearms legislation were enacted in the 1930s, which imposed controls and restrictions on a specified class of dangerous weaponry, including machine guns, sawed-off shotguns, and the like. *See* National Firearms Act of 1934, 48 Stat. 1236; Federal Firearms Act of 1938, 52 Stat. 1250.

Congress's next foray into this realm did not come until 1968, in the wake of widespread domestic unrest and civil disorder that culminated in riots in major cities and the assassinations of Martin Luther King, Jr. and Robert Kennedy. In that year, Congress passed the Omnibus Crime Control Safe Streets Act which, in part, created a new chapter of the United States Code, 18 U.S.C. §§921-928, and incorporated many of the provisions that had been first enacted in the Federal Firearms Act. Pub. L. No. 90-351, 82 Stat. 197. Only four months later, Congress revisited the same issues in the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. These two enactments combined to impose broad and novel constraints on the possession and use of firearms that went well beyond their mere transport in interstate commerce.

Among the provisions of these statutes were several that plainly indicated Congress's view that its authority to address the problems posed by increasing gun violence went well beyond the

mere regulation of interstate commerce in firearms and ordnance. First, Congress extended federal licensing requirements to all firearms dealers, whether or not they operated in interstate commerce. Second, Congress criminalized the mere possession of firearms by certain kinds of individuals, including felons, mental incompetents, drug addicts, and illegal aliens. Third, Congress made specific findings that it presented as the justification for its statutory measures.

Among the congressional findings was the following statement that the principal purposes of the legislation were to assist state and local law enforcement and to keep guns away from children:

> The principal purposes of [these measures] are to aid in making it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States.
>
> The ready availability; that is, ease with which any person can anonymously acquire firearms (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotic addicts, mental defectives, armed groups who would supplant duly constituted public authorities, and others whose possession of firearms is similarly contrary to the public interest) is a matter of serious national concern.

S. Rep. No. 1097, 90th Cong., 2d Sess., at 2-3, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113-14 (emphasis added). Similar objectives were reflected in the title of the omnibus measure, which stated its aim as: "to assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice

systems at all levels of government, and for other purposes." *Id.* at 1, *reprinted in* 1968 U.S.C.C.A.N. at 2112.

It is important to note that among the statutory provisions contained in the 1968 legislation, and therefore resting on these congressional findings as its foundation, was 18 U.S.C. §922. That provision is the very section at issue in this case, which was amended in the Gun-Free School Zones Act to add the safe school subsection under fire here. Yet this subsection, which is after all nothing more than an amendment to the underlying statutory section, indeed shares the same objectives and rests on the same findings as did the original enactment of section 922 -- to assist state and local law enforcement officials "in combating the increasing prevalence of crime" and to limit the "ready availability" of firearms "to juveniles without the knowledge or consent of their parents or guardians." S. Rep. No. 1097, *supra*.

Two subsequent amendments to section 922 mirror this approach. In 1986, Congress passed the Firearms Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 449. This legislation added several new subsections to section 922, especially subsection (o), which made it illegal to transfer or possess a machine gun. The legislation did not contain any separate findings to establish any link between these new subsections and Congress's power to regulate interstate commerce, but instead simply relied on the findings contained in the original 1968 enactments. When these provisions were later challenged under the Commerce Clause, this reliance was correctly held to be constitutionally sufficient:

> When it first enacted section 922, Congress found facts indicating a nexus between the regulation of firearms and the commerce power. . . . The 1986 amendments to section 922 added sub-section (o) without substantially altering the findings of fact on this point. . . . [It] is within the authority granted to Congress by the Commerce Clause.

United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993).

Two years later, Congress added a new subsection (p) to section 922, which banned the manufacture, sale, transfer, or possession of plastic firearms. Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816. Once again, this statute did not rest on any new congressional findings establishing a link to the regulation of commerce. As with the 1986 amendment, moreover, this statute did not by its terms require any link with interstate commerce, banning as it did the mere possession of such items, no matter how they were produced and obtained.

The same approach was followed in the Comprehensive Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789. Among its many provisions was another amendment to section 922, adding a new subsection (q), which is being challenged in this case. Once again, the legislation lacked any explicit findings relating its provisions directly to the regulation of commerce. But Congress's view of the intimate relation between crime and economic activity was articulated when it stated that the law "is intended to provide a legislative response to various aspects of the problem of crime in the United States. The damage inflicted by criminals -- whether it be physical, emotional, or monetary -- takes a heavy toll on our society." H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess., at 69, *reprinted in* 1990 U.S.C.C.A.N. 6472, 6473.[1] No better statement is needed to show the undeniable link between the prevention of crime, especially violent crime involving firearms, and the regulation and promotion of commercial activity in our society.

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[1] The same congressional report also quoted President Bush's statement, in urging passage of his proposal to combat violent crime, that "assuring the physical safety of our citizens and inhabitants is among the very highest responsibilities of government." H.R. Rep. No. 101-681(I), at 69, *reprinted in* 1990 U.S.C.C.A.N. at 6473.

B. A Natural And Inevitable Link Between Economic Activity and Protection of the Public Safety Exists Regardless of Congressional Findings.

Even if Congress had never made any findings about the direct link between its power to regulate commerce and laws regulating the possession and use of firearms, the more general link between congressional power to regulate commerce and the enactment of necessary crime legislation is manifest in any event. Indeed, it was broadly emphasized by many of the writers whose works and ideas were relied upon by the framers of the Constitution.

The obvious natural link between economic activity and protection of the public safety was perhaps described most fully and accurately by Thomas Hobbes. Writing in *Leviathan* about the consequences of public disorder, "wherein men live without other security, than what their own strength, and their own invention shall furnish them withall," he chillingly observed:

> In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

Id., Part I, ch. 13. He thus called for an omnipotent sovereign power to enforce rigid obedience to the law and make possible the improving features of ordinary civil and commercial society.

These same points were adapted and elaborated by John Locke in his theories of the state of nature and the origins of civil government. After contending that human labor gives value to every thing that is found in nature, he observed that "a King of a large fruitful Territory [in 17th century America] feeds, lodges, and is clad worse than a day Labourer in England." John Locke, *Of Civil Government*, ch. V, §41. The reason for this disparity, again, was found to lie in the dependence of economic activity on reliable assurances of personal security. For "the enjoyment of the property he has in [the state of Nature] is very unsafe, very unsecure. This makes him willing to . . . joyn in Society with others who are already united, or have a mind to unite, for the mutual Preservation of their Lives, Liberties and Estates." *Id.*, ch. IX, §123. "The great and chief end, therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property." *Id.*, ch. IX, §124.

And again, as the founding of our nation moved forward, Adam Smith was presenting this very point in *The Wealth of Nations*:

> It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provoked, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government.

Id., Book V, Part II. In this manner, public order makes possible a broad system of exchange, which encourages commercial activity replete with innovations such as the division of labor, thereby ultimately producing the wealth of nations.

These are some of the grand yet common principles of political philosophy upon which our Constitution is based. The simple point, however, is that the power to regulate commerce must include, among the powers "necessary and proper" to its exercise, U.S. Const., art. I, §8, the legitimate authority to protect the public safety by enacting criminal laws to address any problem that Congress may reasonably find to be of national dimension.

This generous view, indeed, mirrors the position adopted by this Court in *Wickard v. Filburn*, 317 U.S. 111 (1942). In that case, the Court confronted a federal marketing quota that was applied to a farmer who grew only a small amount of wheat primarily for consumption on his own farm, with some to be sold intrastate. The Court specifically held that if the activity addressed by the statute had an effect on interstate commerce, it was subject to congressional regulation, whether any such effect was defined as "direct" or "indirect." *Id.* at 125. Because Congress could reasonably, if expansively, conclude that the regulated activity could conceivably affect interstate commerce in wheat, then it could regulate even incidental uses of this item. *Id.* at 118-29. Similarly, in this instance Congress has acted to regulate the use made of firearms in particular circumstances, which not only may affect the national market for such weaponry, but also affects public security. And public security is basic to the prosperity of any economic marketplace whatsoever.

In addition, Congress is acting here to curb the growing tide of gun-related violence in this country, which clearly has a fairly direct impact on interstate commerce and travel. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964) (race discrimination in hotels affects interstate commerce). "So long as the activity regulated has an effect on interstate

commerce," it is within Congress's power to regulate that activity. *United States v. Johnson*, 1994 U.S. App. LEXIS 8370, at *8 (6th Cir. Apr. 22, 1994) (upholding federal carjacking statute, 18 U.S.C. §2119, because it is "obvious that carjackings as a category of criminal activity have an effect on interstate travel and the travel of foreign citizens to this country").

This connection can also be shown through statistical data. As another court has noted in upholding the constitutionality of 18 U.S.C. §922(o), which prohibits the possession of machine guns:

> Congress specifically found that at least 750,000 people had been killed in the United States by firearms between the turn of the century and the time of the Act's enactment. It was thus reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry.

United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991). Similarly, a congressional report on the Brady Handgun Violence Prevention Act, enacted by Congress earlier this year, cites a study that estimates the direct medical costs in this country of injuries relating to firearms at $1,400,000,000 annually, and the indirect economic cost of lost productivity due to such injuries at $19,000,000,000 annually. *See* H.R. Rep. No. 103-344, 103rd Cong., 1st Sess., at 8, *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985. And the costs of such violence perpetrated by and against children, who may lose their whole futures, economic and otherwise, in a single incident through death, severe injuries, or extended incarceration, are so incalculable as to defy such documentation.

Thus, even if one focuses narrowly on the specific problems addressed by gun-free school zones, separate and apart from the broader issues posed by regulation of the possession and use of firearms, and apart from the even broader issues posed by

the insistent need for action to protect the public safety, the essential nexus between this legislation and interstate commerce remains. This law is part of a larger congressional response to the national crime problem, especially the growing crisis of gun violence in this country. That response has been presented, revised, and re-revised now for decades. The specific provision for gun-free school zones is but one piece of that larger response, and is germane to problems that Congress has found to warrant action as it pursues the larger goal of cooperating with the States to protect the public safety. That goal is both an end in itself and an indispensable means to promoting interstate commerce. As such, this legislation falls well within the legitimate constitutional authority of Congress under Article I, Section 8.

II. CONGRESS IS NOT REQUIRED TO REITERATE OR REINFORCE ITS PREVIOUS FINDINGS ESTABLISHING PROPER FEDERAL AUTHORITY TO LEGISLATE IN A PARTICULAR AREA EACH TIME IT AMENDS ITS PRIOR STATUTES OR UNDERTAKES ANY RELATED INITIATIVES IN THAT SAME AREA.

This Court's prior decisions do not impose a strict standard that Congress must satisfy in order to establish its constitutional authority to legislate in a particular area. Instead, the Court has held that such conflicts "are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination." *Wickard*, 317 U.S. at 129.

Accordingly, this Court has held that congressional authority under the Commerce Clause reaches "those activities affecting commerce." *Perez v. United States*, 402 U.S. 146, 150 (1971). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to

excise, as trivial, individual instances' of the class." *Id.* at 154 (emphasis in original). Thus, if the class of activities is shown to have an effect on interstate commerce, then Congress can properly regulate with respect to any particular activity within that class without having to prove that the particular activity by itself has any direct or indirect effect on interstate commerce.

Indeed, in *Perez*, the Court expressly cautioned that Congress need not "make particularized findings in order to legislate." *Id.* at 156. If Congress reasonably could find, therefore, that the class of activities regulated affects interstate commerce, then its constitutional authority is properly established. The appropriate judicial inquiry is thus quite deferential. And if Congress does make findings in this regard, those legislative determinations are entitled to be given substantial weight by a reviewing court. *Id.; see also Evans*, 928 F.2d at 862; *Hale*, 978 F.2d at 1018.

Set in this perspective, the ruling below is plainly in error because it does not adhere in letter or spirit to the analytical approach laid down by this Court. In essence, the court below nitpicked the federal statutory enactments that have resulted in 18 U.S.C. §922, disassembling and isolating its various parts in an conscious effort to achieve the goal of invalidating its new subsection (q). The proper approach instead would be to view this statutory section as a whole, and to recognize that Congress's findings, presented at different points in the evolving development of this criminal statute, provide a strong foundation for its constitutional vitality. For Congress has found, over more than two decades, that all manner of activities involving firearms affect interstate commerce, some directly and others indirectly, but all of them potently.

Indeed, the approach embodied in the ruling below does not give sufficient respect to Congress as a coordinate branch of the Federal government. If Congress once has made legislative findings that suffice to authorize its undertaking to regulate a

particular class of activities, then it is pointless and even demeaning to hold that Congress must repeat the very same findings, or variations upon them, each time it goes back to amend or revise its earlier enactments. Not only would such a requirement waste valuable legislative resources that would be better spent on clarifying and harmonizing the statutory language, but also it would serve no real purpose since, as this Court has held, no higher authority obliges Congress to make any particularized findings at all before it can legislate. *Perez*, 402 U.S. at 156.

Some might conclude, as the court below apparently did, that the statutory restrictions here on possessing or discharging firearms within a school zone constitute relatively "trivial" instances of the class of activities involving firearms that create an overall effect on interstate commerce. Yet Congress apparently did not agree, and as gun violence and injuries to children continue to mount across the country, this position will be harder to maintain in any event. But even if it were so, *Perez* dictates that the statute must be upheld as long as the broader class of activities are within the proper scope of congressional legislative authority. *See* 402 U.S. at 154. And if practical concerns are to be raised about the law instead, then this Court supplied the ready answer in *Wickard*: "with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." 317 U.S. at 129.

III. THE AREA OF CRIMINAL LAW ENFORCEMENT TO PROTECT THE PUBLIC SAFETY, WHICH IS MARKED HISTORICALLY BY CLOSE COORDINATION AND MUTUAL ASSISTANCE BETWEEN THE STATES AND THE FEDERAL GOVERNMENT, REPRESENTS THE NATION'S CLASSIC TRADITIONS OF COOPERATIVE FEDERALISM.

In the United States, criminal law enforcement is perhaps the single realm in which state and local officials have coordinated most effectively and consistently with their federal counterparts. Throughout our history, the federal criminal laws have been understood to supplement state criminal law, and the overlapping jurisdictions thus created have been mutually and harmoniously adjusted. This area of government action thus presents one of the fine examples of cooperative federalism, where differences and difficulties have been resolved not only in the political arena, but also at the ordinary levels of everyday administration. This Court itself has described the standard historical approach as "the entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity." *Elkins v. United States*, 364 U.S. 206, 211 (1960). For this reason, the amici States would counsel that this Court should proceed with great caution before acting to invalidate criminal enactments on grounds of so-called constitutional federalism.

A. State and Federal Cooperation in the Area of Law Enforcement, Which Is Desired by Citizens and Both Sovereigns, Should Be Permitted and Encouraged by This Court.

Throughout our nation's history, federal officials and state and local law enforcement officers have teamed up to conduct

investigations, gather facts, identify and pursue suspects, make arresting and charging decisions, and prepare prosecutions for crime. These cooperative efforts are commonplace today, and reflect the same kinds of efforts that also occur on a daily basis between state and local law enforcement officials. In addition, further coordination occurs regularly on such matters as detainers, extraditions, sentencings, confinement and treatment of prisoners, and the filing of legal briefs such as in this very case.

Indeed, at times this close cooperation between federal and state officials has posed doctrinal difficulties for this Court, such as in the so-called "silver platter" cases that arose under the Fourth Amendment. In such cases, the federal courts for a time permitted the introduction of evidence in federal cases that was obtained in a state search by means which, if engaged in by federal officers, would constitute a violation of the Fourth Amendment and require the bar of the exclusionary rule to be applied. *See, e.g., Feldman v. United States*, 322 U.S. 487, 492 (1944); *Byars v. United States*, 273 U.S. 28, 33 (1927). This doctrine was ultimately abolished by this Court for a variety of reasons in *Elkins*. *See id.*, 364 U.S. at 223-24. Nonetheless, the Court still cautioned in the decision that "[f]ree and open cooperation between state and federal law enforcement officers is to be commended and encouraged." *Id.* at 221.

The supplemental spheres of state and federal criminal law thus present an overall example of "cooperative federalism," which "allows the States . . . to enact and administer their own [laws,] structured to meet their own particular needs," and permits the Federal government to do the same. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). The enactment of criminal laws by Congress does not impose any unnecessary burdens on the States, and it maintains clear lines of

political accountability between the functions of the States and the Federal government. *See, e.g., Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 782-84 (O'Connor, J., dissenting).[2]

B. Mutual Accommodation of State and Federal Interests in the Area of Law Enforcement Serves the Interests of the States As Well As Those of the Federal Government.

The amici States would suggest that, for the most part, the States have welcomed the additional resources and assistance that follow from congressional attention to the larger crime problems of our society. In this area, Congress is not seeking to act on the States as States, but is directly legislating upon individual citizens, in harmony with the proper framework of our system of federalism. *See, e.g., Hodel*, 452 U.S. at 286; *see also The Federalist*, Nos. 15, 16 & 27 (A. Hamilton); *FERC v. Mississippi*, 456 U.S. at 791-96 (O'Connor, J., dissenting). Thus, congressional action in the area of criminal law enforcement is most accurately seen as supplemental to state action rather than as intruding upon it or obstructing it.

In addition, the area of criminal law enforcement is one where potential differences and necessary adjustments between federal and state action have been managed successfully through the political processes. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-554 (1985); *see also* Wechsler, *The*

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[2] This Court has held that the considerations raised above in the text are germane to cases involving challenges raised under the Tenth Amendment. As the Court has also noted, however, the proper legal analyses under the Tenth Amendment and under Article I, Section 8 (especially the Commerce Clause) are mirror images of one another. *New York v. United States*, 112 S. Ct. 2408, 2417 (1992).

Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). The efficacy of the safeguards found in this mechanism are shown by the restrained manner in which possible preemption issues have been handled both by Congress and by this Court.

For the most part, it has been recognized that standard doctrines do not and should not prevent the States from prosecuting where the same act constitutes both a federal offense and a state offense under the police power. *See, e.g., Gilbert v. Minnesota*, 254 U.S. 325, 331-332 (1920). Congress is extremely sparing in its attempts to preempt state criminal laws, and this Court likewise has been reluctant to find that even provisions governing the very same conduct should be applied to find federal preemption of state authority. The exceptions to this rule, which are rare and indeed extraordinary, only tend to confirm its solid foundations. *See, e.g., Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (holding that federal law punishing sedition against the United States preempts state laws governing sedition against the United States but not sedition against the State). In the instant case, for example, Congress expressly disclaimed any intent to preempt state law by this enactment. 18 U.S.C. §922(q)(3).

In this particular case, the amici States believe it is likely that the federal legislation at issue here will prove to be complementary and beneficial to continuing state efforts in this same area of assuring safer schools for our children. The dangers posed by gun-related violence in the schools are becoming severe, and there is frankly no good reason why this Court should interject a wholly unnecessary constitutional obstacle to further cooperation between the States and the Federal government in addressing this urgent problem.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, this Court should reverse the decision of the Court of Appeals for the Fifth Circuit and reinstate Respondent's original conviction under 18 U.S.C. §922(q).

Respectfully submitted,

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No. 93-1260

In the

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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No. 93-1260

In the

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October Term, 1993

UNITED STATES OF AMERICA
Petitioner,
v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) submits this amicus curiae brief in support of respondent Alfonzo Lopez. Written consent to the filing of this brief has been granted by counsel to all parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest.

PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. Such authority has been granted in this action.

Amicus seeks to augment the historical discussion of congressional authority under the Commerce Clause of the United States Constitution. PLF has participated in numerous cases involving the Commerce Clause. *E.g.*, *Wilson v. Biggs*, No. 93-772 (Jan. 18, 1992), *denying cert. to*, 1 F.3d 1537 (9th Cir. 1993). *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977); *United States v. Osteen*, No. 93-6398 (6th Cir.), *reviewing*, *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993). PLF has also participated in many cases addressing the superfluous legal obstacles that thwart effective law enforcement. *E.g.*, *Illinois v. Gates*, 462 U.S. 213 (1983) (arguing for the "good faith exception" to the exclusionary rule). PLF's experience in the above areas will provide an additional viewpoint to this case.

Congressional action beyond its constitutional authority, effected in the name of whatever "national emergency" happens to stoke the political fires, undermines this Nation's concept of ordered liberty as envisioned by the Ratifiers of the Constitution. "By giving the government unlimited powers, the most arbitrary rule can be made legal; and in this way a democracy may set up the most complete despotism imaginable." Friedrich A. Hayek, THE ROAD TO SERFDOM 82-83 (1944). Our federal system was established to prevent this, yet it is being undermined through a seemingly benevolent, yet misguided federal intrusion into domestic matters having little or no connection with interstate

commerce. It is on this basis that Pacific Legal Foundation submits this brief amicus curiae.

STATEMENT OF THE CASE

PLF adopts respondent's Statement of the Case and incorporates that portion of respondent's brief herein.

OPINION BELOW

In *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), the Fifth Circuit Court of Appeals held 18 U.S.C. § 922(q) (Supp. 1993) (Gun Free School Zones Act or Section 922(q)), to be beyond the scope of the congressional commerce power. 2 F.3d at 1367-68.[1]

Alfonzo Lopez, Jr., a San Antonio High School senior, was caught on school grounds with a handgun. *Id.* Mr. Lopez was charged with violating Texas Penal Code § 46.04(a), which prohibits possession of a firearm on school property. *Id.* at 1345 n.1. State charges were later dropped in favor of a federal prosecution under Section 922(q). *Id.* After being found guilty in the District Court, Mr. Lopez' successful appeal to the Fifth Circuit centered on the constitutionality of Section 922(q).

The Fifth Circuit noted that Section 922(q) made it a federal crime to carry an unloaded firearm in an unlocked suitcase on the public sidewalk in front of one's home if the sidewalk happens to be within 1000 feet of a tiny church kindergarten. 2 F.3d at 1346 n.4. Quoting this Court's opinions in *Gregory v. Ashcroft*, 501 U.S. 452, 115 L. Ed. 2d 410 (1991), and *New York v. United States*, 120 L. Ed. 2d 120 (1992), the court below stated that though the text of

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[1] The court below also noted that the indictment failed to allege a nexus with interstate commerce. Thus, it could not be sustained. *Id.* at 1368.

the Tenth Amendment does not affirmatively define the limits of the commerce power, "the reach of that power is not *un*limited, else there would be nothing on which the Tenth Amendment could operate." *Lopez*, 2 F.3d at 1347. The lower court then discussed this Court's opinion in *United States v. Bass*, 404 U.S. 336 (1971), which construed the federal "felon in possession" statute to maintain the sensitive state-federal balance. *Lopez*, 2 F.3d at 1347. The court below noted that the current "felon in possession" provision, 18 U.S.C. § 922(g), now contains a clear nexus to interstate commerce, a caveat Section 922(q) lacks. *Id.*

The court thoroughly outlined the history of federal firearms regulation, showing that despite the expansion of congressional regulation since the New Deal, Section 922(q) goes well beyond prior enactments and exceeded the congressional commerce power. The court noted that every single firearms regulation at the federal level applied *not* to the mere passive possession of an ordinary firearm by an ordinary person, but almost exclusively to regulating commercial transactions, distribution, and practices associated with the firearms business. *Lopez*, 2 F.3d at 1348-57. In other words, the regulated activities all had an express nexus to interstate commerce. Statutes that reached intrastate commercial entities or activities, or related transactions, were enacted "in order to control firearms traffic "'moving in or otherwise affecting interstate commerce.'" *Id.* at 1351. Section 922(q) also lacked this characteristic. The court below also discussed and distinguished the "few, discrete exceptions" to the rule limiting federal regulation to commercial transactions or interstate activity. *Id.* at 1354.

With that history, the Fifth Circuit turned to Section 922(q) and its legislative history, neither of which makes any mention of interstate commerce. *Id.* at 1359. Further, even

the President of the United States questioned the constitutionality of Section 922(q). *Id.* 1359-60 & n.39.

The Fifth Circuit then analyzed our Commerce Clause jurisprudence, claiming that a series of cases, culminating in *Wickard v. Filburn*, 317 U.S. 111 (1942), restored the commerce power to its purported breadth under *Gibbons v. Ogden*, 22 U.S. 1 (1824). 2 F.3d at 1360. But it also noted that the *Gibbons* Court stated that Article I of the Constitution does not include every type of commerce, nor intrastate commerce. *Id.* at 1361. The Court also stated that modern doctrine (*e.g., Wickard*), required a "*substantial economic effect on interstate commerce.*" *Id.* Otherwise, the Fifth Circuit noted, the chain of causation could be infinite, reaching every private activity, because in some theoretical sense it would affect interstate commerce. *Id.* at 1362.

The lower court recognized that judicial deference to Congress was based on either the text of the statute, legislative findings, or inferred intent from legislative history showing a nexus with interstate commerce. *Id.* at 1362-63 (citing, *e.g., Katzenbach v. McClung*, 379 U.S. 294 (1964)). Section 922(q) has none of these. *Id.* at 1363.

The lower court continued, stating that a congressional enactment, while presumed constitutional, is entitled to less deference if it appears "to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.* at 1364 (quoting *United States v. Carolene Products, Co.*, 304 U.S. 144, 152-53 n.4 (1938)). Section 922(q) represents an "incursion by the Federal Government into territory long occupied by the States," *i.e.*, education and simple firearms possession. *Id.* Employing the "plain statement" rule, the court below required that, if Congress intends to alter the fundamental constitutional balance between the state and federal governments, it must

make its intention to do so clear in the language of the statute. *Id.* at 1365 & n.48.

Thus, because Section 922(q): (1) reaches even the most remote acts of mere passive possession, having no relation to interstate commerce; (2) offers no hint of a congressional determination that such activity was related to interstate commerce; (3) "plows through new ground and represents a sharp break with the long-standing pattern of federal firearms legislation," *id.* at 1366; and also because (4) mere passive possession of a firearm was distinguishable from the "class of activities" cases such as *Wickard*; the lower court held Section 922(q) unconstitutional. *Id.* at 1366-68 & nn. 49, 50 & 51.

SUMMARY OF THE ARGUMENT

The Gun Free School Zones Act, while seemingly virtuous, undermines our federal system. The Fifth Circuit correctly considered individual liberty and the interests of the States in declaring Section 922(q) beyond the scope of congressional commerce power. No other congressional enactment has intruded so far into an area better left to the States--passive, individual, noncommercial, nontransactional, intrastate acts. The statute lacks any congressional finding of the requisite economic effect on interstate commerce and an interstate commerce nexus as an element of the crime. It also conflicts with the constitutional text, the Bill of Rights, applicable precedent, and the intent of the Ratifiers. While case such as *Heart of Atlanta Motel* upheld the congressional prohibition of certain commercial activities of certain businesses that were found by Congress to substantially affect interstate commerce, the present activity goes much further. It prohibits private, noncommercial acts within 1,000 feet of the property line of any school, even though such acts were

never found by Congress to affect interstate commerce in any way.

If this act is upheld, will Congress next be able to extend its reach to any activity within 1,000 of the Heart of Atlanta Motel, or Mr. Filburn's wheat farm (*see Wickard v. Filburn*)? May the 1,000 foot zone next be extended to one mile, or even 1,000 miles? If the Second and Tenth Amendments are ignored here, may the First or Fifth Amendments be ignored next?

Mr. Lopez, a teenager, could and should be prosecuted by *Texas* authorities *under state law* for possessing a firearm *on* school property. Such a criminal prohibition is immeasurably different from the one at issue here, which would also criminalize and federalize the mere possession of an otherwise legal, ordinary firearm. Such regulation is plainly better left to the States. Otherwise, the Ratifiers' worst fear--of an unrestrained, centralized, potentially despotic seat of power--will be realized. For these reasons, Section 922(q) should be held unconstitutional by this Court.

ARGUMENT

I

THE GUN FREE SCHOOL ZONES ACT UNDERMINES OUR FEDERAL SYSTEM, WHICH WAS CREATED TO PROTECT INDIVIDUAL LIBERTY

The Tenth Amendment of the United States Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. The Constitution delegates to

Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. Art. I, § 8, cl. 3. The Fifth Circuit referred to both of these provisions to question whether Congress may regulate an individual's mere possessory act that is intrastate, noncommercial, and has not been found by Congress to have any effect on interstate commerce. *Lopez*, 2 F.3d *passim*.

Most of this Court's recent jurisprudence dealing with the Tenth Amendment and the authority of Congress under its Article I powers has dealt with subjecting state governments to generally applicable laws. *E.g., New York v. United States*, 120 L. Ed. 2d at 140. The government attempts to undercut the reasoning of the Fifth Circuit by misconstruing this case law. According to petitioner, because this Court has reviewed Commerce Clause questions as they relate to state sovereignty more often than private activity, it must hold state sovereignty in higher regard than individual liberty. *See, e.g.*, Brief for the United States at 28. A more credible reason for this past focus on state sovereignty, however, is that Congress has never intruded so far into the private lives of individuals *without specifically finding that the given activity has a substantial effect on interstate commerce and requiring a nexus with interstate commerce as an element of the crime. C.f., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244-53 (1964).

Moreover, the government's argument that state sovereignty is worthier of constitutional protection than personal liberty is contradicted by what this Court has identified as the fundamental purpose of our federal structure in *New York v. United States*, 120 L. Ed. 2d at 154:

> The Constitution does not protect the sovereignty of States for the benefit of the States. To the contrary, the Constitution

divides authority between federal and state governments *for the protection of individuals*. State sovereignty is not just an end in itself: *Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.*

Id. (internal quotations omitted) (emphasis added). This has always been the principled rationale of our federal system. "It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object." *The Federalist No. 45*, at 289 (James Madison) (Clinton Rossiter ed., 1961).

Thus, the text and structure of the Constitution, and the Tenth Amendment, place the internal operations of a state beyond the reach of Congress, *e.g.*, *Coyle v. Smith*, 221 U.S. 551 (1911), even if they affect interstate commerce. The rationale for this constitutional rule is that it protects individual liberty. It would therefore be untenable to conclude that the noncommercial, intrastate, personal actions and decisions of individuals were within the reach of Congress because this would be an even more egregious assault on the individual liberty guaranteed by our federal system. If Section 922(q) is upheld, then there is no limit to the power of Congress. Such authority was never delegated by the people, and to permit it creates the very real "risk of tyranny and abuse." *Gregory v. Ashcroft*, 115 L. Ed. at 422.

II

THIS COURT SHOULD NOT ALLOW CONGRESS TO ALTER THE DELICATE BALANCE OF STATE-FEDERAL AUTHORITY

Section 922(q) makes it "unlawful for any individual knowingly to possess a firearm" within 1,000 feet of school property. 18 U.S.C. §§ 922(q)(1)(A), 921(a)(25), 921(a)(26). This prohibition is unconstitutional for two reasons. First, Section 922(q) is more expansive than any other federal regulation enacted under the commerce power because it prohibits personal, intrastate, noncommercial, nontransactional conduct. This fact is illustrated by noting that this Court upheld enactments in both *Wickard v. Filburn*, 317 U.S. 111, 115-17, 130 n.30, where the enactment was applied to the conduct of a commercial wheat farmer, not a weekend gardener; and *Katzenbach v. McClung*, 379 U.S. at 304, where the enactment was applied to Ollie's Barbecue, a commercial establishment, not a backyard family barbecue. Second, it intrudes upon the delicate balance of state-federal relations in the areas of education, local law enforcement, and firearms regulation, areas not only "traditionally regulated by the States," *Ashcroft*, 115 L. Ed. 2d at 423, but so intimately connected with a state's police power that uniform national rule is unwarranted. At the very least, it is ambiguous whether Congress intended to intrude so far into matters so intimately connected with the states' respective police powers, *Ashcroft*, 115 L. Ed. 2d at 430, as well as the personal passive conduct of private citizens with no link to interstate commerce. Therefore, this Court should not attribute such an intent to its legislative counterpart.[2]

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[2] The test for determining the constitutionality of legislation enacted under the Commerce Clause requires that there be a "rational basis for a *congressional* (continued...)

The government claims that, because Congress has clearly proscribed Mr. Lopez' conduct, this Court need not be concerned with whether such an exercise of power has been linked to the Constitution, or whether Congress has even considered the Constitution. Brief of the United States at 30-31. This Court, however, has never allowed this. *E.g.*, *Ashcroft*, 115 L. Ed. 2d at 420-30; *Bass*, 404 U.S. at 339-50; *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 237-47 (1985)(sovereign immunity not abrogated absent plain statement to that effect); *United States v. Tot*, 319 U.S. 463, 463-64, 467 (1943)(gun possessed by felon presumed to be shipped interstate violates due process). "States occupy a special and specific position in our constitutional system and *... the scope of Congress' authority under the Commerce Clause must reflect that position.*" *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 556 (1985) (emphasis added).

In *United States v. Bass*, this Court found a federal statute ambiguous as to whether Congress intended to criminalize *any* possession of a firearm by a felon or only those firearms that were proven to have traveled in interstate commerce. 404 U.S. at 337-39. This Court rejected the former "broad reading in the absence of a clearer direction from Congress." *Id.* at 339. Though this Court upheld the same enactment after Congress addressed this constitutional concern, *Scarborough v. United States*, 431 U.S. 563, 566 (1977), (element of crime was that the firearm at one time traveled in interstate commerce), the court below properly stated that it is questionable whether "Congress can

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[2] (...continued)
finding that the regulated activity *affects interstate commerce.*" *Hodel v. Indiana*, 452 U.S. 314, 323 (1981) (emphasis added); *contra* Brief of United States at 14 (which, in light of cases requiring a nexus with interstate commerce, *e.g.*, *Bass*, 404 U.S. 336, misconstrues the constitutional standard). There was no such congressional finding in this case.

constitutionally punish the mere possession of firearms." *Lopez*, 2 F.3d at 1347 (internal quotations omitted). This is especially so when the face of the statute does not contain a nexus with interstate commerce as an element of the crime. *See, e.g., Barrett v. United States*, 423 U.S. 212, 213 n.1, 214 (1976) (statute contained such a nexus and explicit congressional findings of threat to interstate commerce). Even if a nexus were supplied for Section 922(q), there is still no credible analogy between a felon in possession, a teenager in possession, or an ordinary law-abiding citizen in possession (which this statute also reaches). Firearms in the possession of felons are contraband, are nearly impossible to trace through interstate commerce, and thus pose a much greater threat to interstate commerce than the acts criminalized by Section 922(q). Felons in possession also pose a threat less readily dealt with by the states.

Despite this, the government in this case claims that by failing to require any nexus with interstate commerce, Congress did supply the "clearer direction" required in *Bass*, 404 U.S. at 339, even though Section 922(q) intrudes further into state and private interests than any other Commerce Clause measure. *Lopez*, 2 F.3d at 1348-59; *see also, e.g., Champion v. Ames*, 188 U.S. 321 (1903) (prohibition of *interstate transport* of lottery tickets constitutional); *Wickard*, 317 U.S. 111 (use of wheat by a farmer, *who was a member of the cartel approving of the national regulation in question, and engaged in the commercial enterprise of producing and selling wheat*, deemed to have a *substantial economic effect* on interstate commerce); *United States v. Pereira*, 347 U.S. 1 (1954) (punishing the transportation of stolen goods *across state lines* constitutional); *Atlanta Motel*, 379 U.S. 241 (a *commercial enterprise* that catered to *interstate travelers* deemed to "substantially" affect interstate commerce in the *civil rights context*); *Perez v. United States*, 402 U.S. 146 (1971) (intrastate extortionate *credit transactions with a*

commercial business establishment normally conducted by *national* organized crime organizations affect interstate commerce). Past congressional enactments invoking the commerce power have all been clearly linked to interstate commerce. Because Section 922(q) presents such a sharp break in legislative approach, to simply omit any nexus with interstate commerce is unacceptable. *Will v. Michigan Department of State Police,* 491 U.S. 58, 65 (1989).

The position taken by the government ignores the fact that congressional action should be dictated by the Constitution, not that constitutional meaning should be dictated by Congress. This head-in-the-sand approach to the legislative process is precisely what this Court has sought to prevent through its modest requirement that Congress expressly refer to and heed its enumerated constitutional grants of authority. Because the Tenth Amendment is a part of the Bill of Rights, and because the management of education, local law enforcement, and the ownership of ordinary firearms by ordinary citizens have traditionally been a state responsibility, the Gun Free School Zone Act "indisputably represents a singular incursion by the Federal Government into territory long occupied by the States." *Lopez*, 2 F.3d at 1364; *see also* Tex. Penal Code § 46.04(a) (prohibiting possession of firearms on school grounds). Such an incursion enhances the importance of congressional findings and a nexus with interstate commerce.

Furthermore, because these issues are so uniquely within the police power of the respective states, it would not be rational to conclude that the Gun Free School Zones Act was within the commerce power even if Congress had made such a finding. While it may be rational to regulate the possession of illegal firearms by convicted felons in order to protect interstate commerce, and it may be rational to assert jurisdiction when ordinary citizens are engaged in activities

that have substantial repercussions on interstate commerce, it is irrational to federalize simple, purely local, noncommercial firearms possession. "However difficult in application, this principle is essential to the maintenance of our constitutional system." *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938). *See also Scarborough v. United States*, 431 U.S. at 571 ("Congress is aware of the distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity *substantially affecting interstate commerce.*"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (local activities may be regulated if they have a "close and substantial relation to interstate commerce"); *Wickard*, 317 U.S. at 125 (local activity may be regulated if it has a "substantial economic effect" on interstate commerce); *Russell v. United States*, 471 U.S. 858, 860-61 & n.4 (1985) (property substantially affected interstate commerce only because it was used for commercial purposes); *Michigan Protection and Advocacy Service, Inc. v. Babin*, 799 F. Supp. 695, 735 (E.D. Mich. 1992) ("sole remaining limitation on Congress' power under the Commerce Clause is the requirement that the effect be *substantial*").

No matter what is required of Congress, though, it has failed to make clear that it intended to upset the sensitive federal state balance and intrude into personal, noncommercial, intrastate behavior. For the additional reason that the statute does not even require a nexus to interstate commerce, it is invalid.

III

THIS CASE PRESENTS A RARE INSTANCE WHERE THE JUDICIARY MUST ACT AS A CHECK ON CONGRESS

Though Commerce Clause jurisprudence has adapted through the transition from a local to a national economy, *EEOC v. Wyoming*, 460 U.S. 226, 247 (1983) (Stevens, J., concurring), this grant of authority is not unlimited. Unfortunately, though, as Circuit Judge Buckley stated: "[I]t is virtually impossible to conjure up any human activity (with the possible exception of day-dreaming) that some court will not find to burden interstate commerce." James L. Buckley, *Federalism and the Scope of the Federal Criminal Law*, 26 AM. CRIM. L. REV. 1737, 1738 (1989). Should this Court decline to affirm the Fifth Circuit's decision, Judge Buckley's facetious comment will become reality.

A. Judicial Deference to Congressional Ambiguity Would Be Inappropriate in This Instance

The Gun Free School Zones Act is among the most far reaching of congressional enactments, improperly federalizing wholly private, noncommercial, nontransactional, intrastate acts by individuals that have no effect on interstate commerce. It also displaces local law, as in the present case, which may be better tailored to local conditions to avoid the absurd results that Section 922(q) could engender. This is wholly inappropriate, considering the fact that mere possession of an ordinary firearm, as well as the constitutional balance between state and federal interests, are admittedly protected by several provisions of the Bill of Rights. *E.g.*, The Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449-461 (currently at 18 U.S.C. § 921 (Note) (protecting rights secured under the

Second, Fifth, and Tenth Amendments)). *Cf. Carolene Products*, 304 U.S. at 152 n.4 (narrower presumption of constitutionality when legislation frustrates political processes or reaches within the first ten amendments).[3] It would therefore be inappropriate for this Court to defer to Congress.

As the Fifth Circuit noted, the Tenth Amendment is as much a part of the first ten amendments as the First Amendment. Just as Congress is constrained from regulating the commerce of publishing, it too is constrained from intruding into matters reserved to the states and to the people. *New York v. United States*, 120 L. Ed. 2d at 137. Thus, it reaffirms, and provides a rule of construction for, the limits imposed on the exercise of the congressional power contained in the text of the Constitution and its other amendments. *Id.*

Additionally, no matter how one interprets the Second Amendment,[4] it exists. This amendment, while controversial, indisputably affords protection against federal intrusion into the "right of the people to keep and bear Arms." U.S. Const. Amend. II. The controversy attaches to whether that right is a States' right or an individual one. *Compare* Laurence H. Tribe, *American Constitutional Law* 299 n.6 (2d ed. 1988) *with* Amicus Brief on Behalf of Academics for the Second Amendment, *et al.*, *and* Don B.

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[3] Because Section 922(q) also reaches private conduct, it may raise Fourth Amendment and due process concerns. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. ___, 120 L. Ed. 2d 674 (1992); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[4] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II.

Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992).

Thus, the Second Amendment, along with the Tenth Amendment and the specific enumerations of congressional power, do not permit federal prohibition of the mere possession of ordinary firearms by ordinary citizens, either as an individual right, or because it is a power retained by the States. Furthermore, Article I of the Constitution recognizes this reserved States' right by explicitly "reserving to the States respectively" at least some authority over the militia. U.S. Const. Art. I, § 8, cl. 3.[5] Hence, Texas has prohibited children from bringing guns to school, but it still allows sportsmen, farmers, or those concerned with home defense who live near schools the liberty to exercise their rights. The federal act, though, reaches too far.

Under this act, Congress has exceeded one of its constitutional prerogatives, and it is the duty of the judiciary

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[5] Many states today also have laws which provide for an "unorganized militia," comprised of the entire military-age male populace. *See, e.g*, Cal. Mil. & Vet. Code §§ 120-23. "The militia of the State shall consist of ... [*inter alia*] the unorganized militia." *Id.* § 120. These statutory provisions vest the Governor with the authority to call out the National Guard and "the unorganized militia." *Id.* § 128. "The unorganized militia may be called for active duty in case of war, rebellion, insurrection, invasion, tumult, riot ...." *Id.* Based on events in the recent history of this country, it is not unreasonable to think that it might be necessary to place some reliance on an unorganized self-armed militia if the United States were to become involved in a military conflict as large as the Persian Gulf War, when most of the National Guard was mobilized and sent overseas, and at the same time be faced with local domestic difficulties as California has experienced in recent years, including earthquakes, fires, and riots. By prohibiting the ordinary possession of ordinary handguns by law-abiding citizens, Congress effectively prevents this necessary option, denying not only individuals, but the States, the opportunity to maintain and protect themselves. This flies directly in the face of our Constitution, which "looks to an indestructible Union, composed of indestructible States." *Ashcroft*, 115 L. Ed. 2d at 422.

to correct the "encroachments and oppressions of the representative body." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The fact that Congress did not require a nexus with interstate commerce on the face of its enactment lends proof to the fact that it did not adequately consider the intrusion it was effecting into matters traditionally and primarily left to the States. *E.g., Ashcroft*, 115 L. Ed. 2d at 426, 430; *Bass*, 404 U.S. at 350. Should this Court find some sort of psychoanalyzed congressional intent, *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348, 378 (1991) (Scalia, J., dissenting), within the Gun Free School Zones Act and rule otherwise, the enumeration of Article I powers becomes meaningless verbiage, allowing Congress to reach into absolutely any area regardless of the nexus such conduct might have with interstate commerce.

This is especially so because Section 922(q) reaches not only Mr. Lopez' possession of a gun on school property, but also what otherwise would be legal handgun possession, 2 F.3d at 1346 n.4, 1366, 1367, marking a more egregious "inroad" than the original "felon in possession" statute in *Bass*, 404 U.S. at 339. The Gun Free School Zone Act, as such, was enacted for the evening news, not to protect interstate commerce. While Mr. Lopez, as a teenager possessing a firearm at school, could and should be prosecuted under the applicable criminal statutes of the State of Texas, it is beyond the reach of Congress to so punish.[6]

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[6] Additionally, the government's claim that Congress places no obligation on the States, Brief of the United States at 28-29, is fallacious. Section 922(q)(1)(B)(ii) requires the States to license firearms and to "verify that the individual is qualified under law to receive the license." As such, the federal government is commandeering the "legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 120 L. Ed. 2d at 140. *See also Printz v. United States*, No. CV 94-35-M-

(continued...)

As Chief Justice Marshall said when the Supreme Court recognized the constitutional limits imposed on *its* jurisdiction: "To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained." *Marbury v. Madison*, 5 U.S. 135, 176 (1803).

With regard to Section 922(q), deference to the political process would be inappropriate, considering the fact that the political process in this case has produced an obviously flawed product. *See Ashcroft*, 115 L. Ed. 2d at 426. "[T]o give state displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [*Garcia*, 469 U.S. 528] relied to protect states' interests." *Id.* (quoting *Tribe, supra* at 480). *See also Bass*, 404 U.S. at 339. Thus, the courts must act as "bulwarks of a limited Constitution against legislative encroachments." *The Federalist No. 78, supra*, at 469. Fulfilling such a duty is hardly judicial activism. "It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *Id.* at 468.

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[6] (...continued)
CCL, 1994 WL 200058 (D. Mont. May 16, 1994). Under this command, if someone walks across a public sidewalk located within 1,000 feet of a school to his house with a .22 caliber rifle after returning from hunting, that individual is committing a federal crime unless the State enacts a licensing mechanism for that individual. *See* 18 U.S.C. § 922(q)(1)(B)(i), (ii), (iii). Also, States that already have (concealed-carry) licensing procedures, *e.g.*, California, Cal. Penal Code §§ 12050, *et seq.*, normally have very strict limitations for issuing a license which will conflict with the vague mandates of Section 922(q). Finally, these concealed-carry permits generally apply only to certain weapons (usually handguns). In effect, then, Section 922(q) presents a burdensome and confusing array of options for the States and firearms owners who live near or travel within 1,000 feet of school property.

Excessive deference to the legislative branch, especially when an enactment lacks a nexus to that body's constitutional authority, is the mirror image of the "legislation by judicial fiat" so often complained about by unsuccessful litigants and dissenting jurists. Excessive judicial deference and judicial activism both allow the union of law making and law interpreting in one body. While judicial activism may undermine the republican spirit of our tripartite constitutional order, the obeisant deference of the judiciary to the Legislature undermines our individual liberty, by abandoning the constitutional duty "to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 466. *See also Marbury v. Madison*, 5 U.S. at 175-76; *Taylor v. Beckham*, 178 U.S. 548, 609 (1900) (Harlan, J., dissenting). The Fifth Circuit did this by declaring Section 922(q) contrary to the manifest tenor of the Constitution. This Court must do the same.

B. The Intent of the Ratifiers Limits the Reach of Congress to Its Enumerated Powers

In 1787, the individual States of this country were presented with a new constitution that provided for a federal system where certain enumerated powers were delegated to the national government. Many of the Ratifiers of the Constitution, however, feared that the national government would ignore the jurisdictional restraints imposed on it by the proposed constitution in the form of its few and defined delegated powers and threaten state sovereignty and personal liberty. *See generally* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 U. VA. L. REV. 1387 (1987); William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740 (1989); John G. Schmidt, Jr., *The Tenth Amendment: A "New" Limitation on Congressional Commerce*

Power, 45 RUTGERS L. REV. 417 (1993). Such a government, located thousands of miles from its constituents, could, many thought, become isolated from its constituents, corrupt, and self-perpetuating. "After we have given them all our money, established them in a federal town, given them the power ... to establish their arbitrary government, what resources do the people have left?" II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 at 62 (Jonathan Elliot ed., 2d ed. 1836) (Elliot's Debates).

Many of the Ratifiers predicted that the powers granted to the federal government by the proposed constitution would result in the despotism of an unresponsive aristocracy within the federal district. "What an inexhaustible Fountain of Corruption are we opening?" Letter of Samuel Osgood to Samuel Adams (Jan. 5 1788), *reprinted* in I THE DEBATE ON THE CONSTITUTION 704, 708 (Library of America 1993). "Liberty! What is Liberty? The power of governing yourselves. If you adopt this Constitution, have you this power? No: you give it into the hands of a set of men who live one thousand miles distant from you." IV ELLIOT'S DEBATES, supra, at 313.

In an attempt to calm these fears, and assure ratification, the Federalists claimed that the structure of the Constitution would actually protect state sovereignty and personal liberty. *The Federalist No. 10* (James Madison). Madison described this structure in *The Federalist No. 52*:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.

> Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 323 (James Madison) (Clinton Rossiter ed., 1961). That the power was divided between the two governments is evident in the text of the Constitution itself, with "the great and aggregate interests being referred to the national, the local and particular to the State legislatures." *The Federalist No. 10,* at 83 (James Madison) (Clinton Rossiter ed., 1961). "The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist No. 45, supra*, at 292-93.

Alexander Hamilton noted that the administration of criminal justice was reserved to the States. *The Federalist No. 17,* at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye ... contributes more than any other circumstance to ... render [the states] at all times a complete counterpoise ... to the power of the Union.

Id.

By comparison, the powers delegated to the federal government were described as "few and defined." *The*

Federalist No. 45, supra, at 292. These few and defined powers, as described by de Tocqueville, "have been confined to a certain sphere; and although the despotism of the majority may be galling upon one point, it cannot be said to extend to all." Alexis de Tocqueville, DEMOCRACY IN AMERICA 170 (Henry Reeve trans., Henry Steele Commager, ed. 1839). Those who opposed the ratification of the proposed constitution were not convinced, though. They wanted a Bill of Rights to assure state sovereignty and individual liberty. In the Virginia ratification debates, George Mason wondered why, if these two items were not "given up, where are they secured? Let the gentlemen show that they are secured in a plain, direct, unequivocal manner." III ELLIOT'S DEBATES, *supra* at 266. *See also* George Mason, "Objections to the Constitution," *reprinted in* I THE DEBATE ON THE CONSTITUTION, *supra*, at 345-49. After the Constitution was ratified these two items were secured by the Bill of Rights, which includes the Tenth Amendment's reiteration of the textual limits on the federal government. *New York v. United States*, 120 L. Ed. 2d at 137-38.

It should also be noted that the characterization of the powers of the federal government as few and defined came before the adoption of the Bill of Rights. In fact, Hamilton predicted that the adoption of a Bill of Rights would give the federal government the "colorable pretext" to run roughshod over the jurisdictional restraints imposed on it in the text of the Constitution by legislating right up to the edge of whatever individual rights were enumerated. *The Federalist No. 84*, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Section 922(q) epitomizes the fears and concerns of the Ratifiers of the Constitution and betrays their intent.

C. The Gun Free School Zones Act Renders Article I of the Constitution Meaningless

1. There Is No Authority for Section 922(q) in the Commerce Clause

The purpose of the Commerce Clause was to quell interstate trade rivalries and to meet the challenges of foreign competition. *The Federalist No. 42*, at 266-69 (James Madison) (Clinton Rossiter ed., 1961). Even in *Gibbons v. Ogden*, 22 U.S. 1, which is often cited for the broad power Congress has under the Commerce Clause, this Court declared that federal power to regulate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations *other than those prescribed in the constitution.*" *Id.* at 196, *quoted in, e.g., United States v. Darby*, 312 U.S. 100, 114 (1941) (emphasis added). One such limitation is that Congress can only regulate *commerce*. The *Ogden* Court defined "commerce" as "commercial intercourse." *Id.* at 189-90; *see also United States v. Mennuti*, 639 F.2d 107, 109-10 (2d Cir. 1981) (noting that *Ogden, Wickard, Atlanta Motel, Jones & Laughlin Steel Co., Katzenbach v. McClung*, and *Perez* all involved businesses or their transactions). Samuel Johnson's DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1765) defined commerce as "[i]ntercourse, exchange of one thing for another, interchange of anything; trade; traffick." Raoul Berger, FEDERALISM: THE FOUNDERS' DESIGN 123 (1987). This definition remains substantially unchanged to this day: "Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise." THE COMPACT OXFORD ENGLISH DICTIONARY 295 (2d ed. 1992). Not every facet of American life can be said to be commercial intercourse, or to have a substantial effect on such intercourse. If Section 922(q) is upheld, however, this truth will be rendered a nullity.

Another limitation prescribed by the Commerce Clause is that the commerce must be among the several States. "The enumeration [of particular classes of commerce] presupposes something not enumerated." *Ogden*, 22 U.S. at 194-95. *See also, e.g., Russell*, 471 U.S. at 860-61 & n.4 (residential property substantially affected interstate commerce under federal arson statute only because it was used for commercial purposes). *United States v. Voss*, 787 F.2d 393, 397 (8th Cir. 1986) (vacant residence owned by a business and insured by interstate insurer does not affect interstate commerce); *Babin*, 799 F. Supp. at 728-35. As this Court stated in *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *overruled on other grounds by National League of Cities v. Usery*, 426 U.S. 833 (1976), federal power is limited to "'commerce,' and not all commerce but 'commerce ... among the several States.' The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional difference still obtains." *Id.* The Constitution itself, read logically and with knowledge of the intent of the Ratifiers, should limit congressional authority over an activity *only if it was both "among the several States" and "Commerce."* This Court should thus hold that Section 922(q) is not within the commerce power.

2. There Is No Authority for Section 922(q) in the Necessary and Proper Clause

Even an analysis that attempts to borrow from the Necessary and Proper Clause, U.S. Const. Art. I, § 8, cl. 18, to find congressional authority for Section 922(q) fails. By comparing the present case to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, a case that looked to the Necessary and Proper Clause, the shortcomings of the present statute become even more evident. As discussed by the court below, the present enactment goes even further than

the unconstitutional statute in *The Civil Rights Cases*. *Lopez*, 2 F.3d at 1364 n.47.

The Civil Rights Act of 1964, at issue in *Atlanta Motel*, stated, on its face, that it was "only" applicable to *business* establishments that were found to *affect interstate commerce* or were supported by state action. 379 U.S at 247. By comparison, the Gun Free School Zones Act is not limited in its scope to business establishments or those transacting with such establishments, but to any individual who possesses an ordinary firearm within 1,000 feet of school property. Will Congress next seek to expand the zones to encompass the cities and towns where the schools or businesses are located? Could it also ban all guns within 1,000 *miles* when it finds that the 1,000 foot zones are not enough? If the commerce power may justify the present enactment, it is boundless. "The underlying thought is merely this, that the law is not indifferent to considerations of degree." *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (Cardozo, J., separate opinion).

An additional difference between *Atlanta Motel* and the present case is that the Court in *Atlanta Motel* had before it ample proof that Congress had considered the constitutional ramifications and bases of its enactment. 379 U.S. at 244-53. *See also Katzenbach v. McClung*, 379 U.S. at 302. There is no such proof here.[7] Even in these two civil rights cases which justify the furthest reach of Congress to regulate local commercial activities "to foster and protect interstate commerce," 379 U.S. at 272, Congress explicitly relied on a nexus with interstate commerce. The Court also had

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[7] Indeed, because legislative history is often unreliable, *Tafflin v. Levitt*, 493 U.S. 455, 472 (1990) (Scalia, J., concurring), the government's citation to myriad educational, sociological, psychological and political authorities, *see Brief of the United States* at VII-IX (Table of Authorities), is also suspect, if not irrelevant.

available to it a record of legislative history replete with evidence, not that discrimination was an evil worthy of attack,[8] but of local, commercial activities burdening interstate commerce. *Atlanta Motel*, 379 U.S. at 245-53, 257, 261; *Katzenbach v. McClung*, 379 U.S. at 299-301. Thereafter, the Court also concluded that it was necessary and proper for Congress to regulate these local, commercial activities because they had "a substantial and harmful effect" on interstate commerce. *Atlanta Motel*, 379 U.S. at 258.

It would be improper for this Court to reverse the Fifth Circuit's decision, in effect, doing what Congress itself failed to do in finding its authority within the Constitution. To do so would "obliterate what is national and what is local," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 37, via congressional ambiguity. For the simple reason that Section 922(q), unlike the enactments at issue in *Atlanta Motel* and *Katzenbach v. McClung*, reaches behavior that is purely local, private, nontransactional, and noncommercial, it is not a necessary or proper exercise of congressional power. This is especially so because state and local law enforcement efforts are much better suited to deal with local illegal ordinary firearms possession. "Congress is simply not as well equipped as state legislators to make decisions involving purely local needs." *EEOC v. Wyoming*, 460 U.S. at 263 n.8 (Burger, C.J., dissenting); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). In fact, the federal prosecution in this case, as well as the enactment, were wholly superfluous to bringing Mr. Lopez to justice.

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[8] *C.f.*, the government's attempt to extrapolate evidence of the evils of violence into an economic effect of such violence on interstate commerce. Brief of the United States at 19-20 (quoting a gun control activist discussing the effect that a fearful environment has on the learning ability of children). Were such evidence relevant, it might also be applied to federalize family discipline, playground fisticuffs, the content of Stephen King novels, or even the content of childhood nightmares.

He was initially dealt with by educational officials and local police. *Lopez*, 2 F.3d at 1345.

By respecting the sovereignty of the states, and the authority of the people of their respective states to shape their governments to their local needs, this Court will further the public safety by recognizing the impropriety of Section 922(q). If Section 922(q) is struck down, "the People would govern themselves more easily, the Laws of each State being well adapted to its own Genius & Circumstances, and the Liberties of the United States would be more secure." Letter of Samuel Adams to Richard Henry Lee (Dec. 3, 1787), *reprinted in* I THE DEBATE ON THE CONSTITUTION, *supra*, at 47 (emphasis in original).[9]

3. There Is No Authority for Section 922(q) in Any Other Provision of Article I

Reading Article I of the Constitution as a whole provides further evidence that the Gun Free School Zones Act is invalid. Under Article I, Congress is given authority

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[9] Additionally, a primary consideration of the judiciary when upholding federal regulation is whether excluding a given activity from "the scheme of [federal] regulation would have a substantial effect in defeating and obstructing its purpose." *E.g.*, *Wickard*, 317 U.S. at 129. This rationale has no application to the present case. The federal government may enforce its law against illegal firearms transactions, transportation, or other such acts having a nexus with interstate commerce, while Texas and its political subdivisions are fully capable of enforcing their laws locally. Neither the federal, nor the local, scheme will be thwarted by limiting the authorities to their respective jurisdictions. Any overlap into purely intrastate affairs will actually result in a waste of resources, as in the present case (where Mr. Lopez was arrested by state authorities), and/or a dilution of the republican accountability our federal system seeks to protect. *Cf. New York v. United States*, 120 L. Ed. 2d at 154-56. In other words, federal criminalization of purely local crimes will allow state officials to deflect responsibility for high crime rates by claiming they are hampered by federal interference, or alternatively, by a lack of federal effort. The Fifth Circuit removed such unrepublican obfuscation.

to punish select crimes such as counterfeiting, maritime piracy, and military crimes. U.S. Const. Art. I, § 8, cls. 6, 10, and 16. Under Article III, it is also given the power to define the punishment for treason. *Id.* Art. III, § 3, cl. 2. These are the sole grants of congressional authority in the realm of criminal law. Furthermore, if Congress can regulate *any* human activity under its commerce power, then the clause granting the power of "exclusive Legislation in all Cases whatsoever" in the District of Columbia, U.S. Const. Art. I, § 8, cl. 17, is redundant. This is further support for the conclusion that Section 922(q) goes well beyond what the Constitution may tolerate. *Van Alstyne, supra*, at 1746.

As this Court stated in *New York v. United States*, 120 L. Ed. 2d at 137: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Id.* Such is the case with maritime piracy. But "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* Such is the case with purely local crime, firearms regulation, education, and the noncommercial, intrastate acts of individuals, which are reserved to the States and to the people. Otherwise, "the chain of causation is virtually infinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place." *Lopez*, 2 F.3d at 1362.

CONCLUSION

By upholding Section 922(q), this Court may be appeasing what some might portray as protection of our children, or ending violence in our cities, both very important ends. At the very least, though, Congress has

made this impossible by failing to find a link with interstate commerce, and by failing to require it as an element of the crime. Under the Gun Free School Zones Act, Congress seeks to do the same in the 50 states as it may do in the District of Columbia--exercise a general police power. By so doing, it undermines the sanctity of our written Constitution, turning that compact and its express protections from tyranny, into a manipulable series of suggestions that may be disregarded at will.

The Fifth Circuit took a very restrained account of individual liberty and the principles of federalism in declaring Section 922(q) beyond the scope of congressional commerce power. Congress has intruded too far into an area better left to the States and to the people--passive, individual, noncommercial, nontransactional, intrastate acts--upsetting the delicate state-federal balance. This Court should therefore adopt and expand upon the lower court's reasoning.

DATED: July, 1994.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA,
Petitioner,
v.
ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE NATIONAL SCHOOL BOARDS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Commerce Clause of the Constitution empowered Congress to enact 18 U.S.C. § 922(q), which makes it a federal offense to possess a firearm in or within 1000 feet of a school.

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE NATIONAL SCHOOL BOARDS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici National Conference of State Legislatures, National Governors' Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers (NCSL *et al.*) are organizations whose members include state and local governments and officials throughout the United States. These *amici* have a compelling interest in the legal issues that affect state and local governments and in the proper working of our federal system.

Amici NCSL *et al.* view with utmost seriousness the problem posed by criminal behavior in our society, and the tragedy of the possession and use of guns in schools. Indeed, Texas has criminalized the possession of a gun in a school since 1974, long before the Gun-Free School Zones Act was enacted, and respondent was prosecuted by state authorities under this state law before the federal prosecution was commenced. Pet. App. 2a n.1.

There are, however, fundamental constitutional questions presented by this case that must be addressed despite the sensitivity of the context in which they arise. It is axiomatic that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399 (1991). And while Congress's power to regulate activity under the commerce clause is without question very

broad, it is not unlimited. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 125 (1942). When Congress legislates at what are, at best, the outer limits of its commerce power, meaningful judicial review of whether that exercise is within Congress's delegated powers is essential if our federal system is to be preserved.

Amici NCSL *et al.* are also concerned that the growing trend toward the unbounded federalization of what have hitherto been state criminal offenses will undermine the working of our federal system in other ways. The identification and proscription of criminal conduct has, since the founding of our nation, been one of the principal concerns of the States. Shifting the focus of this lawmaking from the States to Congress erodes essential features of our federal system. *See Gregory*, 111 S.Ct. at 2399.

The National School Boards Association (NSBA) is a federation of state school boards associations, representing approximately 97,000 of the nation's school board members who, in turn, govern the schools attended by 97 percent of all U.S. public school children. NSBA is deeply concerned about violence and crime in and around the schools and has recently published a guide on effective methods to curb violence in public schools. But redundant federal laws do not address the problem of violence in the schools—they simply make administration of the schools more difficult and could cause delays in bringing perpetrators to justice.

Education in the nation's public schools has long been the function of state and local governments. Accordingly, *amicus* NSBA is concerned with the United States' reliance on findings made in connection with legislation enacted under the spending power to support its argument that education substantially affects interstate commerce. Because state participation in spending programs is voluntary, such findings do not support expansive federal regulation of the public schools under the commerce clause.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

On March 10, 1992, respondent Alfonso Lopez, Jr., a student at Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun. Acting on an anonymous tip, school officials confronted Lopez, who admitted he was carrying the gun. The officials seized the gun (which was not loaded) and five bullets. Pet. App. 2a.

State authorities immediately charged Lopez with violating Section 46.04(a)(1) of the Texas Penal Code. Like many similar state laws, this statute makes it a felony for a person to go "on the premises of a school or an educational institution" while carrying a firearm, and carries a punishment of up to ten years imprisonment and a $10,000 fine.[2] Tex. Penal Code § 46.04(a)(1); *id.* § 12.34. The state charges were dismissed, however, after a federal grand jury indicted Lopez for violating 18 U.S.C. § 922(q), the Gun-Free School Zones Act of 1990. Pet. App. 2a n.1.

The federal indictment did not allege that the firearm Lopez possessed had any nexus to interstate commerce and the United States conceded that Lopez's conduct was

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

[2] The brief *amicus curiae* of various members of Congress baldly asserts that "[t]he Gun-Free School Zones Act represents the first effort to address the growing crisis of guns in schools and the related problems of drugs and gang activity." Br. *Am. Cur.* 16 Members of the U.S. Senate *et al.* 6 (citation omitted). In contrast to the Gun-Free School Zones Act which was enacted in 1990, *see* 104 Stat. at 4968, Texas has proscribed the conduct charged here for more than twenty years. *See* Tex. Penal Code § 46.04(a)(1). Forty States have such laws. *See* Appendix hereto. Many of these laws were enacted before the Gun-Free School Zones Act.

purely intrastate in nature. Pet. App. 50a-53a. Moreover, by its terms, Section 922(q) does not require that the United States prove a nexus to interstate commerce. *See* 18 U.S.C. § 922(q). Nonetheless, the district court denied Lopez's motion to dismiss the indictment, reasoning that the Gun-Free School Zones Act was "a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce." Pet. App. 55a. Thereafter, the court convicted Lopez and sentenced him to six months imprisonment, to be followed by two years of supervised release. Pet. App. 3a.

The court of appeals reversed. The court recognized that under the commerce clause, Congress has the power to regulate purely intrastate activity which has a substantial effect on commerce. *See* Pet. App. 37a-39a. The court also recognized that this Court "has consistently deferred to Congressional findings in this respect," *id.* at 40a, and that "the courts must defer 'if there is any rational basis for' the finding." *Id.* at 43a (citation omitted). The court concluded, however, that it could not "properly perform [its] duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding." *Id.* at 44a.

The court also reasoned that in the absence of a finding, "there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states." *Id.* Because "both the management of education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state responsibility and section 922(q) indisputably represents a singular incursion by the Federal Government into territory occupied by the States[,]" *id.* at 45a, findings were "necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause." *Id.* at 48a. Because neither Section 922(q) itself, nor its legislative history, contains any findings that the purely intrastate activity it proscribes substantially

affects interstate commerce, the court of appeals vacated respondent's conviction. *Id.* at 54a.

SUMMARY OF ARGUMENT

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government[,]" granting to the latter only "limited powers." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399 (1991). Under our constitutional plan, "[t]he States possess primary authority for defining and enforcing the criminal law," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), and the federal government has limited power to define and punish criminal activity. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821); *Keller v. United States*, 213 U.S. 138, 144 (1909).

While an offense may be created and "punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers," *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838), Congress can criminalize activity under the necessary and proper clause only when it is pursuing an end which is clearly within its enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819); *see also Coombs*, 37 U.S. (12 Pet.) at 75. The Court has also made clear that Congress cannot exercise authority not granted to it under the pretext of exercising its enumerated powers. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

2. Congress's power to criminalize activity under the commerce clause is limited by that clause's real and substantial limits. Thus, while Congress can regulate "activity that is purely intrastate in character," *Fry v. United States*, 421 U.S. 542, 547 (1975), that activity must " 'so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of [it] appropriate means to the attainment of a legitimate end.' " *Perez v. United States*, 402 U.S. 146, 151 (1971) (citation omitted). As the Court noted in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), local activity may be regu-

lated pursuant to the commerce power only "if it exerts a substantial economic effect on interstate commerce." *Accord Perez*, 402 U.S. at 151-52. The Court has never gone so far as to "declare[] that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968).

As a regulation of purely intrastate activity, the Gun-Free School Zones Act does not meet these standards. Neither the Act nor the legislative history of the Crime Control Act of 1990 (of which the Gun-Free School Zones Act was a part) contains any reference to the effect on interstate commerce of gun possession in the schools. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844-45; H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472. Although the Act was the subject of hearings by a House subcommittee, the testimony and other evidence received at that proceeding does not establish that firearms possession in the schools has a substantial effect on interstate commerce.

3. Recognizing that Congress, in enacting the Gun-Free School Zones Act, failed to make any findings regarding the impact of gun possession in and around schools on interstate commerce and that the legislative record is devoid of any evidence of an impact on interstate commerce, the United States argues that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known *or which could reasonably be assumed* affords support for it.'" Pet. Br. 16 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (emphasis added). This argument substitutes judicial surmise for legislative factfinding and requires nothing less than the abdication of meaningful judicial review. It also confuses the standard for reviewing the rationality of legislative *means* with that for determining whether legislation is a permissible *end* of the commerce power.

At issue here, however, is not whether Congress has chosen a lawful means to effectuate a concededly valid goal, but whether it has the power to act at all. Precisely because congressional regulation of purely intrastate activity involves the exercise of the commerce power at its outer limits, the Court has recognized that "the mere fact that Congress has said when a particular activity shall be deemed to affect commerce does not preclude further examination by this Court." *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *see also Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). Moreover, in reviewing congressional regulation of purely intrastate activity, the Court has engaged in a searching review of the legislative record to determine that a rational basis exists for concluding that a regulated class of activity has a substantial effect on interstate commerce. *See Hodel*, 452 U.S. at 277-80; *Perez*, 402 U.S. at 155-56; *Katzenbach*, 379 U.S. at 299-301; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964).

Moreover, the Court has never suggested that in assessing the validity of Congress's exercise of power under the commerce clause, courts should assume that a state of facts exists to support it. While courts properly assume a state of facts when assessing the rationality of legislative means, *see FCC v. Beach Communications*, 113 S. Ct. 2096, 2101-02 (1993), this is because the necessary and proper clause grants Congress broad discretion to enact "all means which are appropriate, [and] which are plainly adapted to" a legitimate end. *McCulloch*, 17 U.S. (4 Wheat.) at 421. But it does not extend to the question of the validity of the end itself. The extreme and unwarranted deference on the question of legislative ends urged by the United States is antithetical to a constitutional system which "created a Federal Government of limited powers." *Gregory*, 111 S. Ct. at 2399.

4. The requirement that Congress establish in the legislative record that purely intrastate activity it is crim-

inalizing has a substantial effect on interstate commerce is also supported by the substantial costs which the federalization of traditional state crimes imposes on the federal-state balance and rights granted under state law. Because federalization offers the promise of a federal solution, it diminishes the political accountability of state and local officials and institutions. *See* Roger J. Miner, *Federal Courts, Federal Crimes, And Federalism*, 10 Harv. J.L. & Pub. Pol'y 117, 127 (1987). Moreover, federalization imposes a significant threat to the States' sovereign choices and individual liberty. Many States have exercised their "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Even where, as here, charges brought under the Act merely duplicate a state prosecution, the Act threatens individual liberty because the rules of decision are provided by federal law and therefore preempt state decisions to grant their citizens more expansive fundamental liberties than those provided by the federal bill of rights.

ARGUMENT

A. The Constitution Grants Congress Only Limited Authority To Define And Punish Criminal Activity

It is axiomatic that "[t]he Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Accordingly, "our Constitution establishes a system of 'dual sovereignty between the States and the Federal Government." *Gregory*, 111 S. Ct. at 2399. As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the

> objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.

The Federalist No. 45, at 296 (Isaac Kramnick ed. 1987) (J. Madison); *see also* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

By establishing a system of dual sovereignty and limited federal power, the framers sought to diffuse power in order to protect the people from tyranny. As the Court reaffirmed in *Gregory*, "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the framers to ensure the protection of 'our fundamental liberties.'" 111 S. Ct. at 2400 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting))); *see also Coleman v. Thompson*, 111 S. Ct. 2546, 2570 (1991) (Blackmun, J., dissenting) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power"). Thus, by dividing power between the States and the federal government, our Constitution "reduce[s] the risk of tyranny and abuse from either front." *Gregory*, 111 S. Ct. at 2400.[3]

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[3] As James Madison wrote:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, at 321.

As a textual matter, the Constitution expressly grants authority to the federal government to define and punish criminal activity in only five instances.[4] These limited grants of power demonstrate that the Constitution does not grant Congress a general authority to define and punish criminal activity.[5] Thus, under our constitutional scheme, "[t]he States possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982); *see also Patterson v. New York*, 432 U.S. 197, 201 (1977). As the Court has recognized, "congress cannot punish felonies generally." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821); *see also id.* at 426 ("Congress has . . . no general right to punish murder committed within any of the states."); *cf. Keller*

[4] Article I thus expressly grants Congress the power "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States," art. I, § 8, cl. 6; "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," *id.*, cl. 10; "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14; and "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia and federal reservations. *Id.*, cl. 17; *see also Cohens*, 19 U.S. (6 Wheat.) at 426 ("Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states."). Likewise, Article III defines the crime of "Treason against the United States" and grants to Congress the "Power to declare [its] Punishment. . . ." U.S. Const. art. III, § 3.

[5] The federal government's limited role in defining and punishing criminal activity is also demonstrated by the framers' decision not to grant the federal courts the power to create and punish "common-law offenses against the United States." *United States v. Eaton*, 144 U.S. 677, 687 (1892); *United States v. Britton*, 108 U.S. 199, 206 (1883) (same); *see also Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850). This stands in stark contrast to the practice in the United Kingdom, whose courts have long exercised such powers, *see, e.g., Shaw v. Director of Pub. Prosecutions*, 1962 App. Cas. 220, 266-69 (H.L. 1961) (Op. of Viscount Simonds); *Rex v. Curl*, 93 Eng. Rep. 849, 851 (K.B. 1727), and in the States themselves. *See* 1 Joel P. Bishop, *Commentaries on The Criminal Law* § 35 & n.1. (Williams S. Hein Co. 1986) (7th ed. 1882).

v. United States, 213 U.S. 138, 144 (1909) ("there is in the Constitution no grant . . . to Congress" of the police power).

To be sure, Congress's power to define and punish criminal activity is not limited to these textually explicit grants. At least since *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838), the Court has recognized that an offense may be created and "punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers." The numerous federal offenses contained throughout the United States Code are a strong testament to Congress's broad power to criminalize activity under the necessary and proper clause.

Nonetheless, Congress can criminalize activity under the necessary and proper clause *only* when it is pursuing an end which is clearly within its enumerated powers.[6] *See McCulloch*, 17 U.S. (4 Wheat.) at 421, 423. Since *McCulloch*, the Court has repeatedly reaffirmed that Congress, in creating and punishing criminal offenses, cannot exceed its delegated powers. For example, before construing the criminal statute at issue in *Coombs* the Court stated:

> [I]t seems highly important, if not indispensable, to say a few words as to the constitutional authority of congress to pass the same. For if, upon a just interpretation of the terms thereof, congress have exceeded

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[6] As the Court stated in *McCulloch*:

> [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional . . . .

17 U.S. (4 Wheat.) at 421.

> their constitutional authority, it will become our duty to say so, and to certify our opinion on the points submitted to us, in favor of the defendant.

37 U.S. (12 Pet.) at 75. *See also Perez v. United States*, 402 U.S. 146, 146-47 (1971); *United States v. Darby*, 312 U.S. 100, 118 (1941); *Hodges v. United States*, 203 U.S. 1, 16-20 (1906).

Consistent with this principle, the Court has repeatedly construed federal criminal statutes to confine Congress to its constitutional powers. *See, e.g., United States v. Bass*, 404 U.S. 336, 347-51 (1971); *United States v. Five Gambling Devices*, 346 U.S. 441, 446-49 (1953) (Jackson, J.; joined by Frankfurter & Minton, JJ.); *Coombs*, 37 U.S. (12 Pet.) at 75 ("[I]f the section admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any constitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous.").

Thus, in *Bass* the Court affirmed the reversal of a conviction obtained under 18 U.S.C App. § 1202(a), which prohibited a convicted felon from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm." 404 U.S. at 337-39. In *Bass*, the United States neither alleged in the indictment nor showed at trial that the firearms possessed by Bass "had been possessed 'in commerce or affecting commerce.'" *Id.* at 338. Recognizing that "[a]bsent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction," the Court interpreted that statute to prohibit conviction absent proof by the United States that the gun Bass possessed "was moving interstate or on an interstate facility, or if the possession affects commerce." *Id.* at 350.

B. The Commerce Clause Does Not Authorize Congress's Enactment Of The Gun-Free School Zones Act

As the foregoing demonstrates, Congress's power to criminalize activity under the commerce clause is limited by the scope of that power. Although this Court has sanctioned a broad use of the commerce power, its decisions nonetheless make clear that the commerce clause has real and substantial limits. Were it otherwise, it would be meaningless to speak of a "Federal Government of limited powers." *See Gregory*, 111 S. Ct. at 2399.

Accordingly, while Congress can regulate "activity that is purely intrastate in character," *Fry v. United States*, 421 U.S. 542, 547 (1975), that activity must, as the United States acknowledges, *see* Pet. Br. 12, " 'so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of [it] appropriate means to the attainment of a legitimate end.' " *Perez v. United States*, 402 U.S. 146, 151 (1971) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)). As the Court noted in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), local activity may be regulated under the commerce power only "if it exerts a substantial economic effect on interstate commerce." *Accord Perez*, 402 U.S. at 151-52; *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). Where Congress regulates a class of activities, which in the aggregate substantially affects interstate commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S. at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). But the Court has never gone so far as to "declare[] that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Wirtz*, 392 U.S. at 196 n.27.

The Court has also long made clear that Congress cannot exercise authority not granted to it by the Con-

stitution under the pretext of exercising its enumerated powers. As the Court stated in *McCulloch*:

> [S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

McCulloch, 17 U.S. (4 Wheat.) at 423. Thus, in order to criminalize conduct under the commerce clause, Congress must be regulating interstate commerce. Congress cannot, under the guise of regulating interstate commerce, legislate beyond its delegated authority. And Congress's regulation of intrastate activity must reach activity that has a real and " 'substantial economic effect on interstate commerce.' " *Perez*, 402 U.S. at 152 (quoting *Wickard*, 317 U.S. at 125).

The Gun-Free School Zones Act plainly does not meet these standards. The nature of the conduct it criminalizes (simple possession of a gun in or near a school) has no obvious connection to interstate commerce.[7] The Act itself, which was enacted as Section 1702 of the Crime Control Act of 1990, P.L. 101-647, 104 Stat. 4844-45, contains no findings concerning the effect of firearm possession in the schools on interstate commerce. *See id.* Nor did the report which accompanied the Crime Control

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[7] *Bass* suggests that Lopez's conviction could be sustained if the United States had proved that the firearm Lopez possessed had a nexus to interstate commerce. *See* 404 U.S. at 350. *Amici* acknowledge that the parties stipulated below that an agent of the Bureau of Alcohol, Tobacco and Firearms was prepared to testify that Lopez's firearm was manufactured outside of Texas. *See* Pet. App. 53a. The indictment, however, did not allege that Lopez's offense had any nexus to interstate commerce. *See id.* Because an indictment cannot be amended except by the grand jury itself, and this variance between the allegations of the indictment and this portion of the government's proof would be substantial, Lopez's conviction cannot be sustained on that ground. *See Stirone v. United States*, 361 U.S. 212, 215-19 (1960). Accordingly, Lopez's conviction can only be sustained if gun possession in and around schools substantially affects interstate commerce.

Act discuss the impact on interstate commerce caused by firearms in the schools. *See* H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. 69 (1990), *reprinted* in 1990 U.S.C.C.A.N. 6472. Indeed, as the court of appeals noted, the report did not "even mention the Gun-Free School Zones Act." Pet. App. 34a; *see also* H.R. Rep. No. 101-681(I). Moreover, while the Act was the subject of a hearing by a House subcommittee, this hearing does not remotely establish that firearms possession in the schools has a substantial effect on interstate commerce. Indeed, the legislative record indicates that Congress did not view itself as doing anything other than regulating violent criminals. *See generally Gun-Free School Zones Act of 1990: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (*Hearing*).

It is noteworthy that the United States does not attempt to support the Act based on the statistical evidence received at the hearing. While these statistics unquestionably document individual instances of human tragedy, this alone does not render the underlying activity a permissible end of Congress's power to regulate interstate commerce.[8] *See, e.g., Cohens*, 19 U.S. (6 Wheat.) at 426 ("Congress has no general right to punish murder committed within any of the states."). Rather, under our constitutional scheme, "[t]he States possess primary authority for

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[8] *Amici* Center to Prevent Handgun Violence *et al.* recount that "sixty-five students and six school employees—were killed with guns at schools" and 201 persons were wounded during the academic years 1986-90. *See* Br. *Am. Cur.* Center to Prevent Handgun Violence *et al.* 19. But with the national population of students, teachers, and employees exceeding fifty million people, *see* U.S. Bureau of the Census, *Statistical Abstract of the United States 1993* 148 (1993) (Table No. 223); *id.* at 162 (Table No. 248), these tragedies, even when aggregated over a four year period, do not demonstrate a substantial effect on interstate commerce. Indeed, statistics provided at the hearing indicated that fifteen States had no incidents and that more than half the incidents occurred in only six States. *See Hearing* at 82-83.

defining and enforcing the criminal law." *Engle*, 456 U.S. at 128.

Rather than rely on the statistical evidence presented at the hearing, the United States seeks to sustain the statute by arguing that "[t]he economic consequences of criminal behavior are substantial and, through the mechanism of insurance, spread throughout the population." Pet. Br. 17 (citing *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991)) (footnote omitted). Contrary to the United States' suggestion, this "rather tenuous nexus," *Evans*, 928 F.2d at 862, is insufficient to support the broad police power which the United States urges this Court to sanction. *See* Pet. Br. 44. Long before this nation's founding, insurers were underwriting the perils associated with crime through life and fire insurance policies. *See* George Richards, *A Treatise on the Law of Insurance*, §§ 8-9 (2d ed. 1904). Nonetheless, the spreading of risk through the mechanism of insurance has never been viewed as being a sufficient justification for the federalization of traditional intrastate crimes. And for good reason: such a principle would have no limit and would negate the structural protections of our federal system.[9]

Amici understand the tragedy which each incident of gun violence in the schools involves. But the tragedy is

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[9] The Center to Prevent Handgun Violence also asserts that because the aforementioned firearm incidents cost society approximately $33.5 million dollars over a four year period, Congress would have been justified in "determin[ing] that gun possession in and around schools affects interstate commerce." *See* Br. *Am. Cur.* Center to Prevent Handgun Violence *et al.* 20. Congress, of course, made no such determination. In any event, when Congress regulates purely intrastate activity, the standard is not merely whether the activity affects commerce but whether it has a substantial economic effect on interstate commerce. *See, e.g., Wickard*, 317 U.S. at 125; *Perez*, 402 U.S. at 151-52. This cost ($8.5 million annually) is approximately .00014% of the nation's annual Gross National Product of six trillion dollars. *See Budget of the United States Government: Fiscal Year 1994* 6.

one of violence against individuals, not interstate commerce. Unquestionably the act of striking down a congressional enactment is a serious one, to be taken only when circumstances clearly warrant. But there are other values at stake here as well, notably the preservation of our federal system. Accordingly, where the conduct criminalized by Congress bears no apparent connection to interstate commerce, and where neither Congress in the legislative process nor the federal government at trial has shown the impact of the conduct on commerce, the conviction must be invalidated on the ground that Congress has exceeded its commerce power.[10]

C. The United States' Standard Of Review Requires The Abdication Of Meaningful Judicial Review And Conflates The Standard For Determining The Validity Of Legislative Means With That For Determining Whether Legislation Is A Permissible End Of The Commerce Power

Recognizing that Congress, in enacting the Gun-Free School Zones Act, failed to make any findings regarding the impact of gun possession in and around schools on

[10] The United States also argues that Congress could rationally conclude that gun possession in the schools substantially affects interstate commerce because gun violence interferes with learning and the future productivity of students when they enter the work force. *See* Pet. Br. 19-25. While this cause and effect theory is not implausible, like the insurance theory it is a principle without limit and has no support in the legislative record. As a representative of the American Academy of Pediatrics testified, "Let me conclude by making a plea for the need for continuing to collect data—and I think that was also mentioned earlier this morning. The data is scarce and sketchy." *Hearing* at 52. This witness's prepared remarks stated:

> [S]ystematic and sustained attention to the problem has been lacking. Part of the reason for this is the scarcity of data concerning the involvement of children in the gun epidemic, and a lack of necessary detail in the data that are available. The Academy urges Congress to take steps to ensure that proper records are kept, so that the gravity of the situation can be properly assessed . . . .

Id. at 59-60.

interstate commerce, the United States argues that "the congressional 'finding' can very properly be—and often is—merely implicit in the enactment itself." Pet. Br. 17 n.8. In support of its notion that courts should imply such findings, the United States argues that " '[t]he pertinent inquiry therefore is . . . whether Congress could rationally conclude that the regulated activity affects interstate commerce,' " *id.* (quoting *Hodel v. Indiana*, 452 U.S. 314, 324 (1981)), and that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known *or which could reasonably be assumed* affords support for it.' " Pet. Br. 16 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (emphasis added).

This argument, however, substitutes judicial surmise for legislative factfinding and requires nothing less than the abdication of meaningful judicial review. Moreover, it rests on the faulty premise that the standard for reviewing the rationality of legislative *means* is the same as that for determining whether legislation constitutes a permissible *end* of the commerce power. In this case the question is not whether Congress has chosen an appropriate means of carrying out a permissible goal, but whether Congress has the power to act at all.

Contrary to the United States' argument, the Court has recognized the necessity of a meaningful standard of review when called upon to decide whether congressional regulation of purely intrastate activities is consistent with the limits imposed by the commerce clause. Indeed, it is precisely because congressional regulation of purely intrastate activity (which has traditionally been the subject of state regulation) involves the exercise of the commerce power at its outer limits that a meaningful standard of review is necessary. Otherwise, Congress would be left to determine for itself the outer limits of its power. The Court has thus recognized that:

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this

> Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Katzenbach, 379 U.S. at 303-04. *See also Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a 'rational basis' and are reviewable by the courts."). Thus, in reviewing congressional regulation of purely intrastate activity, the Court has engaged in a searching review of the legislative record to determine whether a rational basis exists for concluding that regulated activity has a substantial effect on interstate commerce. *See Hodel*, 452 U.S. at 277-80; *Perez*, 402 U.S. at 155-56; *Katzenbach*, 379 U.S. at 299-301; *Heart of Atlanta Motel*, 379 U.S. at 252-53.

As these cases demonstrate, when Congress seeks to regulate purely intrastate activity, it must provide courts with a record which shows that the regulated activity has a substantial effect, and not just a trivial impact, on interstate commerce. In the absence of such a record, reviewing courts simply cannot determine whether Congress is exercising powers which the Constitution granted it.

By suggesting that courts should, in effect, speculate as to why Congress might have enacted a particular piece of legislation, the United States argues for no less than the abdication of the duty of federal courts, recognized since *McCulloch* and *Coombs*, to invalidate legislation which exceeds Congress's constitutional authority. *See, e.g., McCulioch*, 17 U.S. (4 Wheat.) at 423; *Coombs*, 37 U.S. (17 Pet.) at 75. The United States' reasoning is truly extraordinary given that one of the principal justifications for the judiciary's deference to legislatures is the latter's superior resources and factfinding ability. *See, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting).

The United States' position would result in courts upholding congressional action even when, in reality, the regulated activity has no substantial effect on commerce. And its practical consequence is to transform the commerce clause into a general police power, a power which the Constitution clearly did not grant to Congress. *See Keller*, 213 U.S. at 144; *Cohens*, 19 U.S. (6 Wheat.) at 428. The United States all but admits as much. Reasoning that because "[t]he economic consequences of criminal behavior are substantial and, through the mechanism of insurance, spread throughout the population," the United States argues that "Congress could rationally conclude that incidents of violent crime, wherever they occur, can be expected to affect the functioning of the national economy." Pet. Br. 17 (footnote omitted); *see also id.* at 44 ("we believe that violent crime *in general* imposes sufficient burdens on interstate commerce to permit Congress very broad latitude to enact measures rationally designed to reduce its incidence").

If, as the United States argues, Congress need only be capable of rationally concluding that particular activity "can be expected" to "affect the functioning of the national economy," *id.* at 17, then *every* crime can be federalized. Indeed, Congress could well make double parking a federal offense. *See, e.g.*, James L. Buckley, *Introduction—Federalism and the Scope of the Federal Criminal Law*, 26 Am. Crim. L. Rev. 1737, 1738 (1989) ("today it is virtually impossible to conjure up any human activity . . . that some court will not find to burden interstate commerce").[11]

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[11] Judge Buckley suggested that daydreaming might be a possible exception to his comment that almost all human activity will be held to burden interstate commerce. *See* 26 Am. Crim. L. Rev. at 1738. But under the United States' standard of review, a court reviewing a congressional prohibition of daydreaming would likely have to sustain the statute. It is, of course, entirely rational to assume that daydreaming reduces economic productivity and thus has a substantial effect on interstate commerce. *See* Pet. Br. 16 (arguing that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it' ")

The decisions of this Court, while admittedly establishing a principle of judicial deference to congressional enactments under the commerce power, have never gone so far as to suggest that courts should simply assume that a state of facts exists which supports a conclusion that a class of activities substantially affects interstate commerce. Thus, while the Court stated in *Katzenbach* that formal *findings* are not necessary to sustain legislation enacted under the commerce clause, *see* 379 U.S. at 299, there (as well as in the companion case, *Heart of Atlanta Motel*), Congress had made an extensive legislative *record* which was "replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." *Id.*; *see also Heart of Atlanta Motel*, 379 U.S. at 252 (noting that "[w]hile the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce"); *id.* at 253 ("voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel").

Likewise, the Court's dictum in *Perez* that Congress need not "make particularized findings in order to legislate," 402 U.S. at 156, does not support the United States. Congress's authority to enact the loansharking statute challenged in *Perez* was amply supported by an extensive legislative record which included hearings and a report detailing loansharking's substantial effect on interstate commerce. *Id.* at 155-56. The Court's dictum merely recognized that, under these circumstances, the findings made by Congress were *pro forma* in nature. *Perez* thus provides no authority for the United States'

(quoting *Carolene Products*, 304 U.S. at 154). The absence of any legislative record evidencing daydreaming's substantial effect on interstate commerce would be no bar either, so long as a study or article could be found which would rationally support the conclusion that daydreaming substantially affects interstate commerce. *See* Pet. Br. 17 n.9 (quoting Ruttenberg, *The Limited Promise of Public Health Methodologies To Prevent Youth Violence*, 103 Yale L.J. 1885, 1887 n.11 (1994)).

assertion that courts should invent a rational basis for concluding that a regulated activity substantially affects interstate commerce.

Notwithstanding the *Perez* dictum, *amici* respectfully submit that Congress must make findings when it criminalizes purely intrastate conduct. Because decisions to regulate such activity have been traditionally the province of the States, findings serve a purpose analogous to the clear statement rule by ensuring that Congress "has in fact faced, and intended to" bring about "a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. But "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring). A legislative record is therefore also required to establish that the intrastate activity Congress is criminalizing does indeed have a substantial effect on interstate commerce. A record thus serves the critical function of demonstrating that Congress has not exceeded its constitutional authority.[12]

Ignoring the critical purpose that both findings and a record serve in judicial review of whether Congress is exceeding its powers, the United States argues that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.'" Pet. Br. 16 (quoting *Carolene Products*, 304 U.S. at 154). This argument is flawed for several reasons.

As an initial matter, *amici* note that the statute at issue in *Carolene Products* prohibited the shipment of filled milk in interstate commerce. 304 U.S. at 146 & n.1. It

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[12] This is of particular importance where, as here, the activity Congress is criminalizing touches upon another area of traditional state and local authority—education. *See, e.g., Board of Ed. v. Rowley*, 458 U.S. 176, 208 n.30 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

therefore clearly was a permissible end of the commerce power.

Of greater significance, the United States simply conflates the standard for reviewing legislative means with that for determining whether the legislation constitutes a permissible end of congressional power. The two, however, are not the same. As the Court noted in *McCulloch*, the necessary and proper clause vests in the Congress broad discretion to enact "all means which are appropriate, which are plainly adapted to" a "legitimate" end. 17 U.S. (4 Wheat.) at 421. Courts must thus grant Congress broad deference in reviewing the means it has adopted in pursuit of its constitutionally authorized ends. But such deference does not extend to reviewing the question of whether Congress has acted within the scope of its constitutionally delegated powers. As stated above, the Constitution does not grant Congress broad discretion to legislate under the authority of a police power for the general welfare, *see Keller*, 213 U.S. at 144, or to punish felonies generally. *Cohen*, 19 U.S. (6 Wheat.) at 428. Rather, its authority is limited to its delegated powers and those "end[s]" which are "legitimate, [and] within the scope of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421. Extreme and unwarranted deference to Congress on the question of ends, rather than means, is antithetical to a constitutional system which "created a Federal Government of limited powers." *Gregory*, 111 S. Ct. at 2399.

While the Court has characterized the standard for reviewing whether Congress is pursuing a permissible end as requiring "defer[ence] to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding," *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981), it has likewise noted that this rational basis must be supported by the "facts and testimony" before Congress. *See, e.g., Katzenbach*, 379 U.S. at 303-04. Consistent with this recognition, the Court frequently has stated that "the mere fact that Congress has said

when particular activity shall be deemed to affect commerce does not preclude further examination by this Court." *Id.* at 303. Thus, in reviewing regulations of intrastate activity under the commerce clause, the Court has engaged in a searching review of the legislative record to determine whether it rationally supports the conclusion that the regulated activity has a substantial effect on interstate commerce. *See id.* at 299-301; *Hodel,* 452 U.S. at 277-280; *Perez,* 402 U.S. at 155-56; *Heart of Atlanta Motel,* 379 U.S. at 252-53.[13]

As these authorities demonstrate, the United States is incorrect in arguing that, in the context of determining whether legislation is within the permissible ends of the commerce power, rational basis review is satisfied by judicial speculation as to whether a state of facts might exist which would support Congress's exercise of this power. In the context of determining whether legislation is within the scope of the commerce power, the rational basis standard requires that Congress have considered evidence that demonstrates that the regulated activity has a substantial effect on commerce. Thus, where in the course of legislative deliberations, conflicting evidence is presented as to a regulated activity's substantial effect on interstate commerce, a court must defer to a congressional finding that it has such an effect.[14] But where

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[13] In *Hodel,* for example, the Court noted that "[t]he Surface Mining Control and Reclamation Act became law only after six years of the most thorough legislative consideration" and that "[c]ommittees of both Houses of Congress held extended hearings during which vast amounts of testimony and documentary evidence about the effects of surface mining on our Nation's environment and economy were brought to Congress's attention." 452 U.S. at 277-79; *see also Perez,* 402 U.S. at 155-56 (detailing legislative record establishing loansharking's substantial effect on interstate commerce).

[14] Likewise, where, as in *Katzenbach* and *Heart of Atlanta Motel,* the legislative record extensively documents that a regulated activity has a substantial effect on interstate commerce such that any findings would be *pro forma* in nature, it may be appropriate to imply a finding.

Congress has failed to make an adequate record, the standard does not allow a court to speculate as to the existence of a state of facts which would support Congress's power to act.[15]

To hold otherwise would create a strong incentive for Congress to refrain from factfinding altogether. This is hardly a desirable result given that factfinding is likely to provide Congress with additional information as to the scope of a purported problem and thus indicate whether it substantially affects interstate commerce, and if it does, what means are appropriate for addressing it. And contrary to the assertions contained in the brief *amicus curiae* filed by various members of Congress, *see* Br. *Am. Cur.* 16 Members of the United States Senate *et al.* 2, it is hardly an onerous requirement to place on Congress given that it routinely holds hearings and makes findings. *See, e.g., Hodel,* 452 U.S. at 277-80; 30 U.S.C. § 201 (setting forth congressional findings showing surface mining's substantial effect on interstate commerce); *Perez,* 402 U.S. at 155-56; Consumer Credit Protection Act, Pub. L. 90-321, § 201 (setting forth congressional findings showing loansharking's substantial effect on interstate commerce).[16]

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[15] The United States confuses two distinct principles in arguing that *FCC v. Beach Communications,* 113 S.Ct. 2096 (1993), is applicable here. Legislative classifications such as those at issue in *Beach* are reviewed more deferentially because of the broad discretion vested in legislatures to choose "the means by which powers [constitutionally] confer[red] are to be carried into execution." *McCulloch,* 17 U.S. (4 Wheat.) at 421. But because Congress does not possess a general police power, "the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." *Hodel,* 452 U.S. at 311 (Rehnquist, J., concurring). Accordingly, "Congress must show that the activity it seeks to regulate has a susbtantial effect on interstate commerce." *Id.* at 313.

[16] *Amici* note that after the court of appeals' decision, the Senate passed legislation which amended Section 922(q) to include findings. *See* Pet. Br. 6 n.2. These findings, however, are entitled to no weight because they are not supported by any record. Moreover, this *post hoc* procedure does not satisfy the Constitution's require-

D. Because The Federalization Of Traditional State Crimes Imposes Substantial Costs On The Federal-State Balance And Rights Granted Under State Law, Courts Properly Require Congress To Show That Regulated Activity Has A Substantial Effect On Interstate Commerce

The United States also dismisses the court of appeals' reliance on the line of cases, beginning with *Bass*, in which this Court has held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly altered the federal-state balance." *See* Pet. Br. 27-31 (quoting *Bass*, 404 U.S. at 349). Noting that "Congress has far greater latitude . . . when its Acts are applied to the activities of private parties who are incidentally subject to concurrent state regulation" rather than to the States as States, Pet. Br. 28, the United States argues that "Congress is not obliged to explain its reasons for legislating, to justify its decisions with findings, or to identify the constitutional source of its authority to act." *Id.* at 30 (citation and footnote omitted). This reasoning ignores the significant costs imposed on the federal-state balance by congressional decisions to federalize traditional state crimes, including the enactment of the Gun-Free School Zones Act.[17]

First, in *amici*'s own experience, enactments such as the Gun-Free School Zones Act interject federal officials into longstanding and close working relationships which

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ment of passage by both Houses and presentment to the President. *See* U.S. Const. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 945-51, 954 n.18 (1983).

[17] The court of appeals recognized that the clear statement rule is a rule of statutory construction. *See* Pet. App. 48a. Nonetheless, the principle which underlies the rule—that under our constitutional scheme, States are also sovereigns entitled to govern " 'all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State,' " *Gregory*, 111 S.Ct. at 2399 (quoting *The Federalist* No. 45, pp. 292-93 (C. Rossiter ed. 1961) (J. Madison))—likewise suggests that courts must have a meaningful way of determining whether Congress has exercised power in excess of its constitutional limits.

exist between local school administrators, police and prosecutors. The friction caused by federalizing traditional state crimes might be tolerable—assuming these crimes had a substantial effect on interstate commerce—if the federal government had the resources and commitment to prosecute these cases. *See* Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y, 117, 126 (1987) (noting that federalization of state crimes has led to "unseemly 'turf' wars"). But as Judge Miner has also noted, "federal law enforcement agencies, prosecutors and courts cannot keep pace with the proliferation of federal crimes." *Id.* It is not clear the federal government has the resources to prosecute such criminal behavior with any regularity. *See Hearing* at 72-73 (noting that there are over 100,000 public schools nationwide and only 1,800 ATF agents). Insofar as the federalization of traditional state crimes offers the promise of a federal solution, it may very well induce complacency in the citizenry. Cf. Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y at 125.[18]

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[18] The federalization of traditional state crimes has also been extensively criticized for the potential burdens it places on the federal courts. *See* Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y at 118 (noting that with the federalization of traditional state crimes, "we have the makings of a glut that threatens to overwhelm the federal courts—courts that were designed to handle a limited number of crimes affecting national interests"); Henry J. Friendly, *Federal Jurisdiction: A General View* 58 (1973) (urging that "[t]he question whether federal criminal prosecutions have not greatly outreached any true federal interest . . . deserves the most serious examination, particularly in light of the tremendous increase in criminal filings . . . ."). *Cf. Report of the Federal Courts Study Committee* 35-37 (1990) (criticizing the growth of federal criminal filings—particularly federal narcotics cases which could be prosecuted as effectively under state law—and noting that "[b]oth the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with crime"); Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y at 124-25 (noting that between 1984 and 1985, "the Southern District of

More significantly, federalizing traditional state crimes only serves to diminish the political accountability of state and local governments. Such legislative action encourages the citizenry to run to Congress to address the latest cause of the day, no matter how tenuous its nexus to interstate commerce and no matter how ill-suited the subject matter is to being regulated through uniform federal rules. In the process, it reduces state and local legislatures to the role of "bench-players" in the governing process. This is truly a regrettable consequence for a constitutional system which has catalogued the many benefits of federalism as including, *inter alia*, "a decentralized government that will be more sensitive to the diverse needs of a heterogenous society," the "increase[d] opportunity for citizen involvement in democratic processes," and the "allow[ance] for more innovation and experimentation in government." *Gregory*, 111 S.Ct. at 2399 (citations omitted).

The federalization of traditional state crimes also diminishes the accountability of local law enforcement officials. As Judge Miner has written:

> The citizenry increasingly has been conditioned to turn to federal law enforcement and to the federal courts as the first line of defense against anti-social conduct. What we are witnessing is an abdication of responsibility for self-government. . . . In the face of municipal corruption, it is easy to send for the 'federals.' If narcotics are sold on the street corners of a major city, it is a simple matter to invoke high-profile federal criminal prosecution. When loan sharks and racketeers infest a municipality, local law enforcement efforts can be relaxed if federal help is on the way.

New York sustained an increase in its *total* criminal caseload of 51.5%, from 695 to 1,053 cases," and asking "[f]rom whence are to come the necessary court facilities and personnel?").

These and other problems created by the federalization of traditional state crimes were extensively discussed at a conference held by the U.S. Attorney General on March 7, 1994.

> But something is lost in the process—the traditions of democratic self-government and of individual involvement and neighborly concern that have been the hallmarks of our society.

Federal Courts, Federal Crimes, And Federalism, 10 Harv. J.L. & Pub. Pol'y at 127; *see also* Friendly, *Federal Jurisdiction: A General View* at 58 ("Is it right to have so many areas where local law enforcement officers can neglect their responsibilities on the basis of an expectation that the 'federals' will do the job?").

While the aforementioned consequences of federalizing traditional state crimes are serious enough to require that Congress demonstrate that it is not acting beyond its delegated powers, even more significant is the threat to state constitutional protections of individual rights posed by enactments such as the Gun-Free School Zones Act. This threat exists, even where, as here, charges brought under the Gun-Free School Zones Act merely duplicate a state prosecution. *See* Pet. App. 2a n.1.

Because the Gun-Free School Zones Act is a federal statute, prosecutions brought under it are governed by federal law. But as the Court has frequently recognized, the States possess the "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution." *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). *See also Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Sibron v. New York*, 392 U.S. 40, 60-61 (1968); *Cooper v. California*, 386 U.S. 58, 62 (1967); Latzer, *State Constitutions and Criminal Justice* 2-5 (1991); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Across a wide range of criminal law issues, many States have adopted more expansive interpretations of individual rights under their state constitutions and statutory law than is required by the federal constitution.[19] *See gen-*

[19] As Justice Brennan has noted, the "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most

erally Latzer, *State Constitutions and Criminal Justice*; Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. at 498-501.

State decisions to provide their citizens with constitutional and statutory protections which exceed those of the federal constitution are surely "decision[s] of the most fundamental sort for a sovereign entity." *Gregory*, 111 S.Ct. at 2400. It is, after all, "[o]ne of the first duties of government" to protect the civil liberties of its citizens. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Yet such state-created protections are, in effect, preempted in any prosecution brought under the Gun-Free School Zones Act because federal and not state law provides the rules of decision. Thus, while the United States simply ignores the threat to state sovereignty and protections of individual rights posed by the federalization of traditional state crimes, *see* Pet. Br. 27-32, that threat compellingly demonstrates why Congress must be required to establish that conduct it has criminalized has a substantial effect on interstate commerce. Requiring Congress to make this showing is a small price to pay for preserving our Constitution.

As the foregoing demonstrates, the court of appeals properly held that courts should not "simply assume that the concededly intrastate conduct [which Congress prohibited here] substantially affects interstate commerce." Pet. App. 50a-51a. As *amici* have explained above, if Congress is to criminalize intrastate activity, it must make a record to show that the activity has a substantial effect and not just a trivial impact on interstate commerce. Because Congress failed to do so here, its enactment of the Gun-Free School Zones Act was beyond its delegated powers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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important development in constitutional jurisprudence of our times." Nat'l L.J., Sept. 29, 1986 (Special Supplement), at S-1.

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APPENDIX

State Statutes Prohibiting Gun Possession In Schools And On School Property:

1994 Ala. Acts 817, § 1
1994 Ariz. Sess. Laws 109, § 1
Ark. Code Ann. § 5-73-119(a)(2) (Michie 1993)
Cal. Penal Code § 626.9 (West 1994)
Colo. Rev. Stat. § 18-12-105.5 (1993)
Conn. Gen. Stat. Ann. § 53a-217b (West 1994)
Ga. Code Ann. § 16-11-127.1 (Michie 1992)
Fla. Stat. Ann. § 790.115 (West 1994); Fla. Stat. Ann. § 810.095 (West 1994)
Idaho Code § 18-3302D (1994)
Ind. Code Ann. § 35-47-9-2 (Burns 1994)
Kan. Stat. Ann. § 21-4204(a)(4) (1993)
1994 Ky. Acts 391, § 1
Me. Rev. Stat. Ann. tit. 20-A, § 6552(1) (West 1993)
Md. Ann. Code art. 27, § 36A(a) (1993)
Mass. Ann. Laws ch. 269, § 10(j) (Law. Co-op. 1992)
Mich. Comp. Laws Ann. § 750.234d (1994)
Minn. Stat. § 609.66 Subd. 1d (1993)
Miss. Code Ann. § 97-37-17 (1993)
Mo. Ann. Stat. § 571.030.1(8) (Vernon 1994)
1994 Neb. Laws 988, § 6
Nev. Rev. Stat. Ann. § 202.265 (Michie 1992)
N.J. Stat. Ann. § 2C:39-5(e) (West 1994)
N.M. Stat. Ann. § 30-7-2.1 (Michie 1994)
N.Y. Penal Law § 265.01(3) (McKinney 1994)
N.C. Gen. Stat. § 14-269.2 (1993)
N.D. Cent. Code § 62.1-02-05(1) (1993)
Ohio Rev. Code Ann. § 2923.122 (1993)
Okla. Stat. Ann. tit. 21, § 858 (West 1994); Okla. Stat. Ann. tit. 21, § 1280.1 (West 1994)
Or. Rev. Stat. § 166.370 (1994)
Pa. Stat. Ann. tit. 18, § 912 (1993)
R.I. Gen. Laws § 11-47-60 (1993)

S.C. Code Ann. § 16-23-430 (Law. Co-op. 1993)
S.D. Codified Laws Ann. § 13-32-7 (1994)
Tenn. Code Ann. § 39-17-1309 (1993)
Tex. Penal Code Ann. § 46.04(a)(1) (West 1993)
Utah Code Ann. § 53A-3-502 (1994)
Vt. Stat. Ann. tit. 13, § 4004 (1993)
Va. Code Ann. § 18.2-308.1 (Michie 1994)
Wash. Rev. Code § 9.41.280 (1992)
W.Va. Code § 61-7-11a (1994)

State Statutes Establishing Gun-Free School Zones:

Ill. Ann. Stat. ch. 720, para. 5/24-1 (Smith-Hurd 1994)
La. Rev. Stat. Ann. § 14:95.2 (1994)
Wis. Stat. Ann. § 948.605 (1993)

NO. 93-1260

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In The

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF TEXAS JUSTICE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF TEXAS JUSTICE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Texas Justice Foundation is a nonprofit corporation that provides free legal representation in cases involving the protection of individual rights and/or cases that seek to limit government to its proper role. Amicus is deeply concerned about federal interference in education. Amicus believes that the future of our country depends upon state, local, and parental control of our nation's schools and that constitutional constraints on

governmental power should be fully enforced. This case raises issues as to the scope of those constraints. The District Court upheld the constitutionality of the Gun-Free School Zones Act, in part, because it decided that education has an effect on interstate commerce. Should this Court adopt the unprecedented expansion of the commerce power sought by the United States, Congress may gain vast power over our entire educational system. The Foundation believes that this result would be contrary to the text, intent, and structure of the Constitution. Moreover, such a result would inevitably lead to further decline of our educational system.

SUMMARY OF ARGUMENT

The United States would have this Court believe that our country is in danger of economic balkanization because a small minority of the citizenry carries guns near schools. This position demonstrates just how far Commerce Clause jurisprudence has departed from the text and original intent of the Commerce Clause. That jurisprudence has now evolved to its inevitable conclusion. If this Court accepts the United States' contention that the commerce power extends to any subject having any remote effect on interstate commerce, then congressional power will be unlimited and Article I, Section 8 will effectively have been written out of the Constitution. "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed. . . . " *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1805).

The United States claims that Congress may reach any activity that has an effect on interstate commerce no matter how small the effect. This position emasculates the text of the Commerce Clause, rendering the three enumerated categories of commerce both redundant and unnecessary. This interpretation would likewise render Article I, Section 8 meaningless because all of the

enumerated powers under Article I have some relationship to interstate commerce.

The structure of the Constitution reflects the federalist values of the Framers, and is inconsistent with a view of the Commerce Clause that would grant Congress unlimited power. The Founders constrained Congress' power to specific enumerated powers to guard against undue expansion of federal power. All other powers were to be reserved to the states. If the United States' position is adopted, the citizens of this country will lose the valuable check that federalism provides against government encroachment on our liberties.

The United States' expansive interpretation of the Commerce Clause stems from the interpretation of the Necessary and Proper Clause in *United States v. Darby*, 312 U.S. 100 (1941). Contrary to the United States' position, the Necessary and Proper Clause is not a mechanism to expand the enumerated powers of Article I, as this Court has held in other cases involving Congress' enumerated powers. The Commerce Clause should be limited to its proper sphere.

The current approach under the Commerce Clause requires courts to defer to congressional judgment that a regulated activity has an effect upon interstate commerce, provided that there is any rational basis for that judgment. This standard grants judicial power to the legislative branch and removes an important check on legislative power. Deference to the judgment of a coequal branch of government on a specific issue is only appropriate where the Constitution gives that branch the power to decide that issue. Here, the Constitution grants the Judicial Branch the power to decide whether Congress is acting within its enumerated powers, so no deference is due. Simply put, "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it." *Marbury*, 5 U.S. at 177.

Because the Judicial Branch has the constitutional duty of preventing Congress from acting outside its enumerated powers, heightened scrutiny is appropriate when considering whether Congress has jurisdiction to act under the Commerce Clause. This Court should adopt a test similar to that applied in dormant Commerce Clause cases. Those cases take a narrow view of what may properly be regarded as regulation of commerce among the several states. The proposed test would bring the jurisdictional inquiry under the Commerce Clause into harmony with the approach in dormant Commerce Clause cases.

ARGUMENT

I. THE COMMERCE POWER DOES NOT EXTEND TO INTRASTATE ACTIVITIES THAT HAVE A TRIVIAL IMPACT ON INTERSTATE COMMERCE.

A. The Overreaching Construction of the Commerce Clause Urged By the United States Emasculates the Constitutional Text and Ignores the Intent of the Commerce Power.

The United States asks this Court to make an unprecedented extension of the power of Congress to regulate interstate commerce. Essentially, the United States contends that the Commerce Clause allows Congress to regulate any activity that has an inconsequential effect on interstate commerce, no matter how attenuated the chain of causation. *See* Brief of United States at 12-25. The Fifth Circuit properly observed that such an expansion of the commerce power would make its scope unlimited. *United States v. Lopez*, 2 F.3d 1342, 1362 (5th Cir. 1993). Indeed, the immense power claimed by the United States does not comport with either the text or purpose of the Commerce Clause. The Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const., art. I, § 8, cl. 3. It does not give Congress the power to regulate commerce and anything having an effect thereon. The Gun-Free School Zones Act has nothing to do with interstate commerce. The Commerce Clause is merely a pretext for yet another incursion by Congress into an area reserved to the states under the Constitution.

The discussion below demonstrates that the Constitution does not grant Congress the sweeping powers sought by the United States. First, the United States seeks an interpretation inconsistent with the text of the

Commerce Clause itself. Second, that interpretation would render other provisions of Article I meaningless. Third, the asserted scope of the Commerce Clause runs counter to this Court's interpretation of other enumerated powers. Finally, this approach is incompatible with the original intent of the Commerce Clause.

1. Text of Commerce Clause

The inquiry into the meaning of the Commerce Clause begins with the text. *Reid v. Covert*, 354 U.S. 1, 8 n.7 (1957) (where language of Constitution is clear and unambiguous it must be given its plain evident meaning). The meaning of the term "commerce" is settled. In *Gibbons v. Ogden*, this Court explained that "commerce" encompasses more than simply traffic in commodities; it encompasses "intercourse." 22 U.S. (9 Wheat.) 1, 189-90 (1824). In other words, the term applies to the instrumentalities of commerce used to carry commodities from one place to another. The *Gibbons* definition of commerce is consistent with both the views of the Founders and of the ordinary meaning of the term "commerce" at the time of the Constitution's drafting. *See* Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387, 1389 (1987).

The Commerce Clause thus anticipates Congressional regulation of trade and the instrumentalities of trade. The accepted definition of "commerce" does not, however, contemplate Congressional regulation of anything that happens to affect commerce. Congress' power is restricted to "that commerce which concerns more states than one." *Gibbons*, 22 U.S. (9 Wheat.) at 194. As this Court explained,

> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state,

> because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state.

Gibbons, 22 U.S. (9 Wheat.) at 194-95.

The *Gibbons* opinion also implies that the Commerce Clause can reach internal commerce which may "extend to or affect other states." 22 U.S. (9 Wheat.) at 194. This much misunderstood statement does not support the broad expansion of the commerce power urged by the United States; it only recognizes that internal *commerce* may affect other states. *Id.* The Gun-Free School Zones Act, however, does not even regulate internal commerce. Carrying a gun near a school has no relation to a commercial transaction "carried on between man and man in a state." *Id.* Even if *Gibbons* can be read to allow Congress to regulate internal commercial transactions, it cannot be read to allow Congress to regulate any sort of intrastate behavior.

In addition, the passage concerning effects on commerce has often been misinterpreted. In *Gibbons*, this Court merely recognized that portions of interstate transactions occur internally in a single state. As goods travel through the several states in the stream of commerce, a portion of that journey necessarily occurs completely within a single state. Accordingly, state and local laws affecting only goods travelling within a state, can directly interfere with the stream of interstate commerce. *See Epstein*, *supra*, at 1405. This interpretation of *Gibbons* is buttressed by the later observation in that opinion that although inspection laws may have a "considerable influence on commerce," the

commerce power does not extend to such internal matters. 22 U.S. (9 Wheat.) at 203. The commerce power thus extends to activities, such as the franchise rights at issue in *Gibbons*, that interfere with actual interstate commercial transactions. It does not extend to purely localized activities that have some nebulous relation to commerce, such as carrying a gun near a school.

An interpretation of the Commerce Clause that brings within its scope any activity having any effect whatsoever upon interstate commerce would render the text of the clause meaningless. The Commerce Clause also grants Congress the power to regulate commerce with foreign nations and with Indian tribes. Any activity that affects commerce of one category in some attenuated way would necessarily affect the other two categories. This result renders the separately enumerated categories redundant. The interpretation urged by the United States, therefore, contradicts the principle that "the Commerce Clause draws a clear distinction between 'States' and 'Indian tribes.'" *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *see Epstein*, *supra*, at 1393-94. In addition, every activity affects commerce in some insignificant way. *Lopez*, 2 F.3d at 1362. Had the Founders intended the commerce power to be unlimited, enumerating three categories of commerce for Congress to regulate would have been unnecessary. *Gibbons*, 22 U.S. (9 Wheat.) at 194-95.[1]

2. Text of Other Constitutional Provisions

The United States' interpretation of the Commerce Clause would make numerous other constitutional provisions meaningless. Extending the Commerce Clause

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[1] The original definition of commerce in *Gibbons* does not render the three categories of commerce either redundant or unnecessary. *Epstein, supra*, at 1394.

to reach any matter that affects commerce would render the enumerated powers nugatory. For example, Congress is granted the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Bankruptcies indisputably have a tremendous affect on commerce. The Founders were aware that bankruptcy strongly affects commerce and is "intimately connected" therewith. The Federalist, No. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961). Had the Founders intended the commerce power to reach anything which affects commerce, the bankruptcy power would have been unnecessary.

Numerous other Article I powers also concern subjects having a substantial effect upon commerce. *E.g.*, U.S. Const. art. I, § 8, cl. 5 (power to coin money); U.S. Const. art. I, § 8, cl. 8 (power to grant intellectual property rights). These powers are all superfluous and without effect if the commerce power extends to any matter that has any effect upon commerce. Such an interpretation would violate the traditional rule that the Constitution should not be interpreted to render other portions of the Constitution meaningless.[2] *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

3. Interpretation of Other Enumerated Powers

The overbroad interpretation of the Commerce Clause urged by the United States also does not comport with the narrow interpretation given to other enumerated powers under Article I. The most analogous Article I power in terms of its scope is the power "[t]o make rules

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[2] The Fifth Circuit recognized that any interpretation of the Commerce Clause that gave it unlimited reach would render the Tenth Amendment meaningless because there would be nothing left upon which the Tenth Amendment could operate. *Lopez*, 2 F.3d at 1347. This Court cannot reverse the decision of the Fifth Circuit without transforming the Tenth Amendment into a nullity.

for the . . . Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Congress' power pursuant to this clause is no less plenary than under any other grant of congressional authority. *Solorio v. United States*, 483 U.S. 435, 441 (1987). Indeed, judicial deference is at its "apogee" when Congressional authority under Clause 14 is challenged. *Id.* at 447. Similarly, Congress' power under the Commerce Clause is plenary. *E.g., Hodel v. Virginia Surface Min. & Reclam. Ass'n.*, 452 U.S. 264, 276 (1981). Despite the similar broad scope of these enumerated powers, Congress has been denied the power under Clause 14 to regulate any matter that may *affect* the land and naval forces.

In *Reid v. Covert*, this Court held that Congress could not subject dependents of military personnel to court-martial. 354 U.S. 1 (1957). The *Reid* decision flatly rejected the contention that Congress could regulate any matter having an *effect* on the land and naval forces: "the Constitution does not say that Congress can regulate 'the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces.'" *Id.* at 30. Similarly, the Constitution does not say that Congress can regulate 'commerce among the several states and all other activities whose regulation might have some relationship to commerce.' The interpretation of Clause 14 in *Reid* is inconsistent with previous interpretations of the Commerce Clause and with the interpretation now urged by the United States.

4. Intent of Commerce Clause

The original purpose of an enumerated power is important. To be faithful to the underlying premises of the Constitution, courts should be aware of those premises when interpreting a particular provision. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985); *see*

also Id. at 563 n.5 (Powell J., dissenting). The purpose of the Commerce Clause was to maintain free trade among the several states. *Cotton Petroleum Corp.*, 490 U.S. at 192; *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The Founders feared that, left to their own devices, states would interfere with interstate commerce and create disagreements between themselves. The Federalist, No. 7 at 39-40. (Alexander Hamilton) (Jacob E. Cooke ed. 1961). The Founders foresaw the need for national control to prevent animosity between the several states. The Federalist, No. 22 at 137 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961); *Baldwin v. GAF Seelig, Inc.*, 294 U.S. 511, 522 (1935). This limited purpose does not suggest the vast expansion of congressional power sought by the United States.

The Gun-Free School Zones Act plainly falls outside the original purpose of the Commerce Clause. The Act has nothing to do with promoting the free flow of commerce or with preventing state control over a subject which would interfere with the flow of commerce.

B. Federalist Values Reflected in the Structure of the Constitution Suggest a Narrow Interpretation of the Commerce Clause.

The unlimited power sought by the United States under the Commerce Clause conflicts with the structure of the Constitution and the values of federalism reflected therein. If those values are to survive, the Judicial Branch must maintain control over Congressional power as it provides the only check on that power.

The Founders intended that federal power be constrained to a limited sphere. The Federalist, No. 46 at 317. (James Madison) (Jacob E. Cooke ed. 1961). In furtherance of that goal, the Federal Government was granted only enumerated powers for the express purpose of controlling the "looseness of vague grants of power." *See Epstein, supra*, at 1396. As Madison explained, "The

powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite." The Federalist, No. 45 at 313 (James Madison) (Jacob E. Cooke ed., 1961); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). States were to have broad powers over things concerning the lives, liberties, and property of the people. *Garcia*, 469 U.S. at 570-71 (Powell, J., dissenting) (citing The Federalist, No. 45).

The Founders feared that a powerful national government "eventually would eliminate the States as viable political entities." *Id.* at 568. They recognized that people would have a stronger affinity for state government and that state government would be more responsive to the people. The Federalist, No. 17 at 107. (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Federalism assures that the government will be more sensitive to the diverse needs of a heterogeneous society. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them." *Garcia*, 469 U.S. at 575 N. 18 (Powell, J., dissenting). State governments have been paralyzed in recent years due to overreaching by Congress and preemption of state control.[3]

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[3] The notion that the values of federalism must give way as the Constitution is adapted to modern times is not well founded. The national economy has always been interrelated in the relevant manner as purely local actions have always had some small effect on interstate commerce. *See Epstein, supra*, at 1396. As Congress continues to usurp more state authority in attempts to further micro-manage this country, the values of federalism are even more imperative. Those values must be affirmed in this case, lest this Court arm Congress with a further weapon to restrict the liberties of the people. As modern problems become more complex and difficult to control, states must be allowed to exercise their constitutional freedom to experiment and

Most importantly, federalism protects fundamental liberties. *Gregory*, 111 S. Ct. at 2400. This protection stems from the combined effects of the responsiveness of state and local governments to the needs of citizens and from federalism's tendency to make government compete for citizens. States are reluctant to restrict liberties either (1) for fear that people will leave and move to other states, or (2) for fear that its own citizens and/or corporations will be disadvantaged *vis a vis* the citizens of other states.

For this check against tyranny to work, however, there must be a healthy balance of power between the states and the federal government. *Gregory*, 111 S. Ct. at 2400; *New York v. United States*, 112 S. Ct. 2408, 2431 (1992). Adopting the interpretation of the Commerce Clause suggested by the United States would eliminate this safeguard and make federal power unlimited. An overambitious Congress should not be allowed, under the guise of regulating commerce, to destroy the federalist structure created by the Founders. If the Gun-Free School Zones Act is constitutional, federalism is dead.

C. The Necessary and Proper Clause Does Not Expand the Enumerated Powers of Congress Under Article I, Section 8.

The United States begins its argument by quoting the infamous decision in *United States v. Darby*: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them

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devise their own solutions to these problems as Congress cannot adequately take into account the myriad of local variables that affect such problems.

appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." 312 U.S. 100, 118 (1941); *see also Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. at 281.; *United States v. Wrightwood Dairy*, 315 U.S. 110, 119 (1942). As authority for the quoted passage, the *Darby* Court cited *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). *See Darby*, 312 U.S. at 118-19. In *McCulloch*, this Court was interpreting the Necessary and Proper Clause of the Constitution. *See generally McCulloch*, 17 U.S. (4 Wheat.) at 411-425. Accordingly, the Necessary and Proper Clause is the source of constitutional authority for extending Congress' power over commerce among the several states to encompass the power to regulate anything that *affects* commerce.

The United States' interpretation of the Necessary and Proper Clause is inconsistent with the very source of authority upon which *Darby* relies, *McCulloch v. Maryland*. Its position also conflicts with the original intent of the Necessary and Proper Clause and later interpretations of that clause in the context of other enumerated powers under Article I.[4]

Those opposing ratification of the Constitution feared precisely the type of expansion of the enumerated federal powers that the United States seeks here. During

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[4] The United States stretches the elastic principle of *Darby* to the breaking point. Under *Darby*, congressional power only extends to those intrastate activities which *so affect* interstate commerce to make regulation of them *appropriate*. *Darby*, 312 U.S. at 118. (emphasis added). Later decisions imply a limit on what activities Congress may appropriately reach under the Commerce Clause. As stated in *Maryland v. Wirtz*, "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad, general regulation of state or private activities." 392 U.S. 183, 196 (1968). The Gun-Free School Zones Act seeks to do just that. Any impact on commerce due to the carrying of guns in a school zone is "relatively trivial" if any impact exists at all.

the debates over ratification, the Necessary and Proper Clause was a source of "much virulent invective and petulant declamation against the proposed constitution . . ." The Federalist, No. 33 at 204 (Alexander Hamilton)(Jacob E. Cooke ed. 1961). People feared that this clause could be used to expand federal power and gradually destroy local governments and exterminate liberty. *Id.* Hamilton replied, "[I]t may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government and vesting it with certain specified powers." *Id.* In other words, the granting of enumerated powers to Congress implies that Congress should have the power to execute those powers.

Hamilton's reassurance strongly suggests that the Founders did not intend the Necessary and Proper Clause to *expand* the scope of the enumerated powers. If, in the absence of this clause, Congress would have the same scope of power by implication as it does with the clause included, the Necessary and Proper Clause can not expand those powers otherwise enumerated. This interpretation is confirmed by Madison: "For in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object; and be often properly varied whilst the object remains the same." The Federalist, No. 44 at 304 (James Madison)(Jacob E. Cooke ed. 1961). According to Madison, the scope of Congress' enumerated powers (the object) remains unchanged. Earlier in the same paragraph, Madison states that the purpose of this clause was to avoid having to write "a complete digest of laws on every subject to which the Constitute relates." *Id.* The Necessary and Proper Clause thus grants Congress the power to employ

"particular powers" in exercising its general powers, strongly suggesting that "particular powers" are narrower in scope than general powers.

The United States' position contradicts the Founder's intent, as it reads the Necessary and Proper Clause as granting a significant expansion of Congress' power under the Commerce Clause. This expansive interpretation results from *Darby* and an undue extension of the famous statement in *McCulloch* upon which *Darby* relies, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional." 17 U.S. (4 Wheat.) at 421.

To justify an exercise of congressional power, *McCulloch* requires (1) that the end be within the scope of the Constitution, (2) that the means be plainly adapted to that end, and (3) that the means consist with the letter and spirit of the Constitution. The standard sought by the United States contradicts each of these requirements. First, it extends the power of Congress beyond the scope of the Constitution. The *Darby* decision does not hide this fact as it declares, in clear contradiction to the text of the Constitution, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states." *Darby*, 312 U.S. at 118. Second, the means are not adapted to the end of regulating commerce. Regulating activities which have a remote effect on interstate commerce are not plainly adapted to the end of regulating commerce. Rather, they allow the use of the Commerce Clause as a pretext to regulate purely intrastate activities.[5] Third, the expansion of

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[5] *McCulloch* also dictates that if Congress passes laws for the accomplishment of objects not entrusted to it under the Constitution under the pretext of executing its enumerated powers, such laws would be unconstitutional. *McCulloch*, 17 U.S. (4 Wheat.) at 423. The

congressional power sought by the United States, as discussed above, does not consist with the letter and spirit of the Constitution. *See* sections I.A. and I.B.

The passage from *McCulloch* relied upon in *Darby* merely restates the principles expressed by Hamilton and Madison in the Federalist Papers. An 'end' refers to one of the enumerated powers of Congress in Article I. For example, in *McCulloch*, the bank at issue was created for the 'end' of raising revenue and applying it to a national purpose under Article I, Section 8, Clause 1. *See* 17 U.S. (4 Wheat.) at 409. A 'means' is simply a particular power used to exercise a more general enumerated power, or a tool used in exercising an enumerated power. The 'means' in *McCulloch* was a bank which allowed conveying of money from place to place. Other examples illustrate the distinction between 'means' and 'ends'. The Court of Claims is a means to pay the debts of the United States under Article I, Section 8, Clause 1, while the Court of Customs and Patent Appeals was a means to collect duties under Article I, Section 8, Clause 1, *See Glidden v. Zdanok*, 370 U.S. 530, 591 (1962) (Douglas, J., dissenting).

When considering whether a specific law passed by Congress is within its jurisdiction under Article I, the question is whether the law regulates subject matter which Congress is empowered to regulate.[6] *See McCulloch*, 17

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position of the United States allows passage of such laws. Under the pretext of regulating commerce, Congress regulates intrastate activities not entrusted to it, but reserved to the states under the Constitution. The Gun-Free School Zones Act is only one example.

[6] If the law merely establishes an agency or an enforcement mechanism, the question is whether the agency or enforcement mechanism operates on subject matter that Congress may reach under Article I. The analysis in *McCulloch* concerning the bank exemplifies such an inquiry. Here, Congress is regulating behavior--the carrying of a gun in a school zone. As described in the text, the constitutional issue is whether this behavior falls within an enumerated category of congressional regulation under Article I. Congress has also used an

U.S. (4 Wheat.) at 421 & 423. In other words, the jurisdictional question is whether the *action* that Congress is regulating falls within an enumerated category. The *Darby* standard, however, is bootstrapping. It considers the regulation of subject matter that has an effect on commerce as a 'means' to the 'end' of regulating commerce. A means to an end, however, is a specific *way* in which the subject matter is regulated. Regulating subject matter that has an effect on commerce is, in actuality, an 'end' in itself. *Darby*, therefore, places additional ends within the reach of Congress simply because they relate in some way to other ends properly within the power of Congress.

The United States' position is also inconsistent with other decisions of this Court interpreting the Necessary and Proper Clause in light of other enumerated powers under Article I. As noted above, Congress has plenary power under Article I, Section 8, Clause 14 to make rules for the regulation of the land and naval forces. Despite the plenary scope of this power, the Necessary and Proper Clause has been interpreted in connection with this power in a way which squarely contradicts the United States' position.

In *Reid v. Covert*, the issue was whether Clause 14 allowed Congress to court-martial dependents of military personnel who had committed a capital offense. 354 U.S. 1 (1957). This Court first observed that if clause 14 is given its natural meaning, the enumerated power did not extend to civilians. *Id.* at 19. As discussed above, if the

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enforcement mechanism, a criminal penalty, as a 'means' to enforce the regulation. Although a criminal penalty is a legitimate means of accomplishing a constitutionally permitted end, the issue remains as to whether the end (the regulation of an action) falls within an enumerated power. Because the behavior--carrying a gun in a school zone--is not part of a commercial transaction among two states or an instrumentality of such a transaction, such behavior does not fall within the 'end' of regulating commerce among the several states.

commerce power is given its natural meaning, it does not extend to any activity which may affect commerce. The government also argued that the Necessary and Proper Clause allowed Congress to subject civilians accompanying military personnel to court-martial. *Id.* at 20. *Reid* rejected the argument that Congress could court-martial civilians simply because they had some relationship to the "land and naval forces." *Id.* at 30. Certainly, if Congress may not regulate activities which affect the land and naval forces, it may not regulate activities which merely affect commerce among the several states. The later decision in *Kinsella v. Singleton*, 361 U.S. 234 (1960), strengthens this conclusion.

In *Kinsella*, the issue was whether Congress could extend the court-martial power to dependents of military personnel in non-capital cases. The government alleged that it was necessary to court-martial dependents charged with non-capital crimes because these dependents "affect the military community as a whole." *Id.* at 238. The special status of dependents in the military community allegedly required disciplinary control and the effectiveness of this control supposedly depended upon the court-martial procedure. *Id.* at 239.

The substantial effect argument was rejected. This Court held that "[i]f the exercise of the power is valid, it is because it is granted in Clause 14, not because of the Necessary and Proper Clause. The latter clause is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.'" *Id.* at 247. The *Kinsella* holding contradicts the United States' position in several ways. First, the quoted passage establishes that for an exercise of power to be valid, the power must be an enumerated one. This axiom is consistent with the holding in *Reid* that Congress should not be granted additional powers under the Necessary and Proper Clause

which are not otherwise granted by the constitutional text. But, *Kinsella* goes further. It holds, consistently with the Founders' intent, that the Necessary and Proper Clause is not itself a grant of power.

The *Reid* interpretation of the Necessary and Proper Clause was distinguished from *McCulloch*, because in *McCulloch*, no specific restraints on the governmental power stood in the way.[7] 354 U.S. at 22. Clause 14, by its terms, limits military jurisdiction to members of the land and naval forces. *Id.* at 22. The same basis for distinguishing *Reid* from *McCulloch* may be applied to the Commerce Clause. Just as Clause 14 limits military jurisdiction to members of the land and naval forces, the language of the Commerce Clause limits commerce jurisdiction to commerce among the several states.

Reid and *Kinsella* properly interpreted the Necessary and Proper Clause. *Kinsella* recognizes that the Founders never intended the Necessary and Proper Clause to be a grant of power in itself. 361 U.S. at 247; *see also, Reid*, 354 U.S. at 20-21 (can not extend military jurisdiction beyond the scope of the power described in Clause 14). These well-reasoned decisions can not be reconciled with the position of the United States, which would greatly expand the commerce power based upon the Necessary and Proper Clause.

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[7] The *Reid* opinion also notes that Article III § 2 and the Fifth and Sixth Amendments required certain express safeguards designed to protect persons from oppressive governmental practices. *Id.* at 22. These safeguards could not be given in a military trial. This alleged difference from *McCulloch* begs the question. The jurisdictional issue in *Reid* was whether Congress could use its power over the land and naval forces to court-martial dependents of military personnel. If clause 14 extended to such persons, then the protections of Article III § 2 and the Fifth and Sixth Amendments would not apply, just as they do not apply to court-martial proceedings against military personnel.

II. TO PROTECT THE STATES AGAINST AN IMPROPER EXPANSION OF THE COMMERCE POWER, CONGRESS SHOULD HAVE THE BURDEN OF SHOWING THAT IT IS EXERCISING ITS ENUMERATED POWERS.

A. Rational Basis Review Makes Congress the Arbiter of Its Own Power.

The current standard for reviewing congressional jurisdiction under the Commerce Clause dilutes the constitutional power of judicial review and upsets the balance of power carefully crafted by the Framers. When reviewing congressional power to legislate under the Commerce Clause, this Court defers to a congressional finding that the regulated activity affects interstate commerce if there is any rational basis for such a finding. *Virginia Surface Min. and Reclam. Ass'n.*, 452 U.S. at 276. "The judicial task is at an end once the Court determines that Congress acted rationally in adopting a particular regulatory scheme." *Id.*

Rational basis review effectively insulates congressional power from meaningful review. Congress need only craft a rationalization to establish a rational basis. This case is no exception. The United States begins by contending that the economic consequences of crime are substantial and through the mechanism of insurance spread throughout the population. Brief of United States at 17. Next, the United States asserts that Congress could reasonably determine that prohibiting gun possession around school premises would reduce the

incidence of firearm violence.[8] The links to interstate commerce are strained.[9]

The Judicial Branch plays a crucial role in "protecting the States from federal overreaching." *Garcia*, 469 U.S. at 567 (Powell, J, dissenting). When considering questions of the separation of powers between coordinate branches of the federal government, additional checks on congressional power normally exist. For example, where the question relates to congressional encroachment on executive power, the President can protect his own powers with a veto. *See e.g. I.N.S. v. Chadha*, 462 U.S. 919 (1983). Thus, the checks and balances created by the constitutional structure act to prevent one branch from usurping the power of another branch without judicial intervention. The Judicial Branch, on the other hand, is the only check against federal encroachment on state powers, especially because states must respect federal law under the supremacy clause.

When determining whether Congress has exceeded its enumerated powers under Article I, no deference should be given to congressional judgement. *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., dissenting). Although deference is justified in other areas, congressional judgment should have no bearing in considering congressional jurisdiction. "Judicial deference

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[8] Curiously, this rationalization fails to explain why congressional legislation on the subject is more effective than state legislation. As the 5th Circuit observed, Texas has had a law since 1974 making Lopez's actions a felony. *Lopez*, 2 F.3d at 1345.

[9] An analogy to proximate cause illustrates the problem. Rational basis review allows Congress to legislate under the jurisdiction of the commerce clause even when there is no proximate relationship between the activity regulated and the free flow of goods between the several states. The link between carrying a gun near a school and interstate commerce is certainly more attenuated than that between the action of the Defendant and the injury of the Plaintiff in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (N.Y. 1928).

is based, not on relevant fact finding competence, but on due regard for the decision of the body constitutionally appointed to decide." *Id.* at 207 (Harlan, J., dissenting). Judicial deference is appropriate when Congress is determining *how* its power should be exercised, because the Constitution gives this responsibility to Congress. Judicial deference is inappropriate when the issue is *whether* Congress has the power to regulate because the Constitution gives the Judicial Branch the responsibility of making sure Congress stays within the bounds of its power.

To prevent Congress from overreaching, the Constitution gives the Courts both the power and duty to determine whether acts of Congress have exceeded those enumerated powers. *See Marbury*, 5 U.S. at 177; *Mitchell*, 400 U.S. at 204-205 (Harlan, J., dissenting). This power and duty stems from the structure of the Constitution. The Judicial Branch interprets the Constitution to determine whether Congress has a specific power. Once this Court has determined Congress has a given power, it properly defers to Congress' decision as to how to implement that power. *Mitchell*, 400 U.S. at 204-205 (Harlan, J., dissenting).

Amici, 16 members of the United States Senate and 34 members of the United States House of Representatives, rely on *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993), for the proposition that legislative judgments may be based upon rational speculation unsupported by evidence or empirical data. (Brief of Amici at 7). This argument confuses the distinction between (1) how Congress chooses to exercise its powers and (2) whether the Constitution grants Congress the power to exercise. In the passage quoted from *Beach*, the issue was whether a statute violated the Equal Protection Clause. There, deference to Congress is appropriate. In exercising its powers, Congress must necessarily make certain classifications. Because the legislature is better suited to make such classifications

based upon the consideration of numerous factors, Courts defer to those classifications as long as they are not suspect and as long as there is a rational basis for them.

In determining whether Congress exceeded its powers under the Commerce Clause, however, a court is not determining why Congress legislated in a certain way. The issue is jurisdiction to pass the law, not the merits of the law. Because the Constitution gives the courts power to decide whether legislation is within the scope of federal jurisdiction under the Constitution, no deference to Congress is justified. *See Marbury*, 5 U.S. (1 Cranch) at 177. Congress decides *how* to legislate, this Court decides *whether* it can legislate.

Rational basis review is also inconsistent with the approach to jurisdictional questions involving the separation of powers between branches of the federal government. For example, courts do not defer to congressional judgment when deciding questions of jurisdiction involving the legislative and executive branches. *See e.g., I.N.S. v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976). Just as no deference is due to Congress' judgment of whether it has exceeded its power under the Constitution *vis a vis* other coequal branches of government, no deference is due to Congress' judgment as to whether it is acting within the scope of its enumerated powers under Article I.[10]

Deference to congressional judgment as to its power to legislate under the Commerce Clause is inappropriate. Such deference takes away from the

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[10] The rational basis approach under the commerce power also conflicts with the approach to other enumerated powers under Article I. Courts normally make an independent review of whether Congress exceeded its powers. For example, no deference is accorded to congressional judgment under Article I, Section 8, Clause 14. *See e.g. Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234, 244-46 (1960) (questioning necessity and effect of court-martial jurisdiction).

judicial power and gives judicial power to Congress. This approach is incompatible with the system of checks and balances crafted by the Founders. *Chadha*, 462 U.S. at 957-58. The time has come to adopt a standard consistent with the text of the Constitution, the intent of that text, and the overall constitutional structure.

B. Heightened Scrutiny Is Appropriate When Considering the Reach of the Commerce Power.

Under the 'dormant Commerce Clause' line of cases, this Court has taken a narrow view of the meaning of 'commerce among the several states.' Indeed, the dormant Commerce Clause doctrine stems from the intent of the Commerce Clause, its text, and the overall structure of the Constitution. When considering Congress' jurisdiction under the Commerce Clause, a standard of review should be employed that is consistent with, and congruent to, the dormant Commerce Clause line of cases.

Dormant Commerce Clause doctrine rests upon the recognition that the Commerce Clause, besides authorizing Congress to regulate commerce among the several states, also prevents the states themselves from regulating commerce among the several states and thereby interfering with congressional power. *See e.g. Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). This limitation results from the realization that "when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." *Gibbons*, 22 U.S. (9 Wheat.) at 199-200.

A state law is invalid, then, when that state law is, in reality, regulating commerce among the several states. If, as the United States contends, congressional power under the Commerce Clause extends to any private activity that has any effect on interstate commerce, then

the principle behind the dormant Commerce Clause attains a vast destructive potential. Because every state law has at least some small effect on interstate commerce, all state laws would be potentially unconstitutional under the interpretation of the Commerce Clause offered by the United States. After all, if any activity affects commerce, states are always doing what Congress is empowered to do when they pass any law because all laws have some small relation to commerce.[11]

To bring the dormant Commerce Clause cases into harmony with the approach to the question of congressional jurisdiction under the Commerce Clause, a new test must be devised for deciding jurisdictional questions. The approach in the dormant Commerce Clause cases is consistent with the Constitution, while the current approach to jurisdictional questions is not.

Pursuant to dormant Commerce Clause doctrine, "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the states." *Great Atlantic and Pacific Tea Co.*, 424 U.S. at 371. Similarly, when deciding whether Congress has jurisdiction to legislate under the Commerce Clause, a showing of a substantial effect on interstate commerce should be required. *Virginia Surface Min. and Reclam. Ass'n*, 452 U.S. at 310-11 & 312 (Rehnquist, J, concurring); *see also NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). "Activities local in their immediacy do not become interstate and national because of distant repercussions." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935). Congress may not use a

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[11] As previously observed, Texas has a law making Mr. Lopez's actions a felony. If, as the United States claims, guns in school zones truly have a substantial effect upon interstate commerce, it is unclear why the Texas law is constitutional under the dormant Commerce Clause line of cases.

relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. *Lopez*, 2 F.3d at 1361. Just as remote and indirect links to health do not justify obstructing commerce, remote links to commerce do not justify interfering with state sovereignty. *See Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 524 (1935). There is no two-tiered definition of commerce. The same definition should be used when deciding questions in dormant Commerce Clause cases as when deciding issues of federal jurisdiction. *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

Of course, if Congress is directly regulating interstate commerce as defined above, there is no need to show a substantial effect on commerce. Given Congress' plenary power to regulate commerce among the several states, the jurisdictional inquiry is over once a court determines that Congress is directly regulating interstate commerce.

The test should require further inquiry, however, when Congress is only regulating an activity having a substantial effect on commerce. Besides demonstrating that the regulated activity substantially affects commerce, Congress should be required to show a compelling need for federal regulation. After such a showing is made, courts should weigh the intrusion on state power against the putative federal benefits. The degree of intrusion allowed should depend upon the nature of the federal interest and whether the states can adequately deal with the problem alone.

The proposed test is consistent with the approach in dormant Commerce Clause cases. Initially, the burden is placed on Congress to justify its intrusion into state affairs. *See Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 353 (1977); *Hughes*, 441 U.S. at 336. To be consistent with the above analysis regarding deference to Congress over questions of congressional jurisdiction, a court should make its own determination of whether a substantial effect on commerce has been shown.

This approach is followed in dormant Commerce Clause cases. *See e.g. Hunt*, 432 U.S at 353-354; *Hughes*, 441 U.S. at 336 (court "will determine for itself the practical impact of the law.)". Like dormant Commerce Clause cases where a state receives less deference when attempting to exercise federal powers, less deference should be given to Congress where it is intruding into the domain of state powers. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981).

The proposed test would also allow courts to weigh the intrusion on state sovereignty against the putative federal benefits. Such a balancing test under the Commerce Clause has been previously approved. *See e.g. Garcia*, 469 U.S. at 562-63. In making this review, the central inquiry is how closely the challenged action implicates the central concerns of the Commerce Clause. *Id.* at 563 n.5. Congress should, therefore, be required to show a close relation between the regulated activity and the central concern of the Commerce Clause, i.e. promoting free trade among the several states. The compelling need for federal regulation should then be weighed against the intrusion on state sovereignty. *E.g. Kassel*, 450 U.S. at 670-71.

In determining whether the need for federal regulation is compelling, courts should consider whether the states are capable of addressing the problem on their own. Courts will only sustain state regulations that discriminate against interstate commerce if they are essential to protect a compelling state interest. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951). Similarly, where intrusion into state sovereignty is not essential, a federal law should be struck down. Courts should also consider whether the federal interest could be promoted with a lesser impact on state sovereignty. *See Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970).

The Gun-Free School Zone Act does not pass constitutional muster under this test. First, the United

States has not come close to meeting its burden to show a substantial effect on interstate commerce. *See Lopez*, 2 F.3d at 1366-68. In addition, the United States has not shown a compelling need for federal regulation. Even if guns in school zones are a serious problem, there is no reason why the states can not handle this problem on their own. Indeed, as observed above, and by the 5th Circuit, Texas has a statute making Mr. Lopez's actions a felony.

III. THIS CASE PRESENTS A PROPER OCCASION TO REEXAMINE PRECEDENT UNDER THE COMMERCE CLAUSE.

The time has come for the Judicial Branch to reassume its role in preventing Congress from exercising powers not entrusted to it under the Constitution. "In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; . . ." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 355 (1827). The line of cases addressing congressional jurisdiction to legislate under the Commerce Clause has departed from those perpetual principles. Overruling precedent is thus appropriate. As this Court has stated, it will not hesitate to overrule precedent "when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause." *Garcia*, 469 U.S at 557.

The modern realities of our national government reflect that the fears of the Founding Fathers are now manifesting themselves. In recent years, Congress has become increasingly less representative of state and local interests and more responsive to national constituencies. *Garcia*, 469 U.S. at 565 (Powell, J, dissenting). State officials, knowing that Congress will eventually make decisions on difficult issues, are reluctant to tackle difficult issues for fear of the political consequences. *See New York v. United States*, 112 S. Ct. 2408, 2432 (1992). As a

result, Congress continues to exercise more powers not granted to it in the Constitution.

The Gun-Free School Zones Act may be based upon good intentions. These intentions, however, are irrelevant. "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 112 S. Ct. at 2434; *see also Dolan v. Tigard*, 1994 U.S. Lexis 4826 at *38, No. 93-518 (U.S., June 24, 1994) (strong public desire will not warrant a shorter cut than the constitutional way); *Reid*, 354 U.S. at 35 n. 62.

Across this country there is a sense that people have lost control over their government. In the last election, 121 new members of Congress were elected in a futile struggle to regain control of the federal government. Efforts to impose term limits on Congressmen, a subject this Court will soon consider, is another manifestation of that struggle. This struggle should be unnecessary. Congress should be restrained to its proper role under the Commerce Clause.

Respectfully submitted,

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No. 93-1260

In The

Supreme Court of the United States

October Term, 1994

United States of America,

Petitioner,

v.

Alfonso Lopez, Jr.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AN OUT OF TIME BRIEF AMICI CURIAE AND BRIEF FOR THE COALITION TO STOP GUN VIOLENCE, THE EDUCATIONAL FUND TO END HANDGUN VIOLENCE, AND THE COUNCIL OF GREAT CITY SCHOOLS AS AMICI CURIAE SUGGESTING REVERSAL

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MOTION FOR LEAVE TO FILE AN OUT OF TIME BRIEF AMICI CURIAE FOR THE COALITION TO STOP GUN VIOLENCE, THE EDUCATIONAL FUND TO END HANDGUN VIOLENCE, AND THE COUNCIL OF GREAT CITY SCHOOLS AS AMICI CURIAE SUGGESTING REVERSAL

The Coalition to Stop Gun Violence, The Educational Fund to End Handgun Violence, and The Council of Great City Schools hereby respectfully move pursuant to rule 30 and 37 of the Supreme Court rules for leave to file the attached brief *Amici Curiae*. The consent of the attorney for the petitioner and the respondent has been obtained.

The interest of the Coalition to Stop Gun Violence in the case arises from the fact that the purposes of the Coalition is to ban the sale of handguns and assault weapons to private individuals. The interest of The Educational Fund to End Handgun Violence arises from their dedication to ending violence caused by the use of fire arms particularly as it effects children. The interest of The Council of Great City Schools is to improve urban education.

In this case, petitioner argues primarily as to the scope of Congress' power to regulate under the Commerce Clause of the United States Constitution. The *Amici Curiae* brief contains a more complete comparison of sections 922(o) and 922(q) of the Act in question than Petitioner's brief. Section 922(o), which regulates machine guns and was upheld by the 8th, 9th and 11th Circuits, was distinguished by the Appellate Court in the instant case. Section 922(q), the statute in question, deals with handguns but is indistinguishable from section 922(o) in relationship to Congress' power to regulate interstate commerce. The *Amici Curiae* brief provides statistical and empirical information that supports both the indistinguishable characteristics of machine guns and handguns, and the effects of guns on interstate commerce. If the argument contained in *Amici Curiae* brief is accepted it would be dispositive of this case.

The *Amici* were unaware of the absence of the argument and supporting facts from petitioner's brief until the petitioner's brief had been filed. An application for extension of time to file a brief *Amici Curiae* had been requested by *Amici* see Appendix A, but denied by the court clerk, see Appendix B. Pursuant to Supreme Court rules 30.4 *Amici* request leave to file their brief out of time.

In the past this Court has approved motions to file out of

time *Amici Curiae* briefs. United States v. Salerno 479 US 1015 (1986); International Union, Automobile Worker v Brock, 475 US 1093, 477 US 279 (1986); American Foreign Ser. Assn v Garfinkel, 489 US 1050 (1989); Mansell v Forbes, 488 US 906 (1988); Booth v Maryland, 479 US 1081 (1987); Johnson v Transportation, 479 US 912 (1986); Arkansas v Oklahoma, 465 US 1018 (1984); City of Newport v Fact Concerts, Inc., 450 US 992 (1981); Goldstein v California, 414 US 883 (1973); United States v Eichman, 495 US 928 (1990); Patterson v McLean Credit Union, 487 US 1231 (1988); Bowsher v Synar, 475 US 1116 (1986); Lemon v Kurtzman, 401 US 931 (1971). The brief amici curiae in the instant case is equally deserving of consideration.

Respectfully submitted

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE COALITION TO STOP GUN VIOLENCE, THE EDUCATIONAL FUND TO END HANDGUN VIOLENCE, AND THE COUNCIL OF GREAT CITY SCHOOLS AS AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST: COALITION TO STOP GUN VIOLENCE

The Coalition to Stop Gun Violence is a non-profit organization founded in 1974. Over the last 20 years the Coalition has grown to include over 40 national professional,

religious and civic organizations.

The purpose of the Coalition is to ban the sale of handguns and assault weapons to private individuals. Exceptions would be made for the police and the military, as well as collectors and target shooters willing to leave their guns at a licensed shooting range. While working to ban these weapons, the Coalition supports intermediate legislative steps to reduce gun violence. The Coalition seeks to achieve its goals through lobbying efforts at the local, state and federal level, and through public education materials explaining the dangers of firearms.

The Coalition supports the Gun-Free School Zones Act of 1990. Support for a gun-free environment for our children is a natural corollary of the Coalition's support for a handgun-free environment in general.

STATEMENT OF INTEREST: EDUCATIONAL FUND TO END HANDGUN VIOLENCE

The Educational Fund to End Handgun Violence was founded in 1978 as a non-profit educational charity dedicated to ending violence caused by the use of firearms, particularly as it affects children.

The Educational Fund seeks to achieve this goal through research, scholarship, and educational efforts at increasing the public's understanding of firearms violence. For instance, the Educational Fund works to prevent youth violence by developing community-run public education campaigns, and a study by the Educational Fund, *Kids & Guns*, now in its third edition, details the serious public health problem firearms pose to our youth.

The Educational Fund also operates the Firearms

Litigation Clearinghouse, the most comprehensive library of firearms litigation information in America. The Clearinghouse is instrumental in helping victims of firearms violence and their attorneys hold those responsible for firearms violence accountable.

The Educational Fund believes that the Gun-Free School Zones Act of 1990 as a legitimate means of reducing firearms violence among children.

STATEMENT OF INTEREST: COUNCIL OF GREAT CITY SCHOOLS

The Council of Great City Schools is the primary advocate for public urban education in the nation. We are a non-profit organization whose mission includes: articulating the needs of urban youth; promoting public policy to ensure educational improvement and equitable delivery of comprehensive programs; providing a forum for urban educators and board members to strategize, to exchange ideas and information, and to conduct research; and creating a national focus for urban education in cooperation with other organizations and agencies. The membership of the Council consists of boards of education for forty-seven urban school districts around the country.

Our interest in the Gun-Free School Zones Act of 1990 stems from our concern about the education of children in general, and particularly the education of children in city schools. Urban schools are already suffering from a lack of financial resources, high dropout rates, underachievement, and drugs and violence. Our school districts are working hard to ensure safe educational environments for their students so that effective learning may take place. Congress decided to help schools in this endeavor by outlawing the possession of guns in

and around schools. We believe that all branches of the government should support schools' efforts to protect our country's greatest resources, our children, and hence to increase educational opportunity and achievement.

SUMMARY OF ARGUMENT

In light of the deference that courts have traditionally afforded Congress in legislating under the Commerce Clause, Congress' enactment of the Gun-Free School Zones Act of 1990 should easily pass constitutional muster. This is especially true given the substantial economic effects that gun violence in schools exerts on interstate commerce through lost years of productivity, burdens on our health care system, and the disruption of the education of our children.

Moreover, Congress' power to regulate handgun possession follows logically from previous court decisions validating its power to prohibit the private possession of machineguns. There is no meaningful distinction between handguns and machineguns which would justify different treatment of the two weapons under the Commerce Clause.

ARGUMENT

I. GUN POSSESSION IN SCHOOLS EXERTS A SUBSTANTIAL ECONOMIC EFFECT ON INTERSTATE COMMERCE.

Congress' exercise of the commerce power is considered valid if there is any rational basis for its finding that the activity it seeks to regulate substantially affects interstate commerce. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 276 (1981). This standard reflects the

deference that courts have traditionally afforded Congress in this area; indeed, as the lower court notes, no Supreme Court decision in the last half century has set aside such a finding as without rational basis. *United States v. Lopez*, 2 F.3d 1342, 1363 n.43 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 39 (U.S. Apr. 19, 1994)(No. 93-1260). In fact, this Court has not required Congress to make formal findings in order to legislate, as long as it properly could have found that the activity it seeks to regulate substantially affects interstate commerce. *Perez v. United States*, 402 U.S. 146, 156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964).

Congress may regulate an activity, even when the individual instances of that activity are local, so long as the class of activities regulated exerts a substantial economic effect on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 125, 127 (1942). Thus, activities such as an individual's production of wheat for his own consumption (*Wickard*), or a single loan shark's attempt to collect on a debt (*Perez*) may be reached by Congress because of the aggregate effect that such activites have on interstate commerce.

Moreover, the activity being regulated need not have a direct effect on the national market for a certain good. Although the Court in *Wickard* upheld the wheat marketing quota provisions of the Agricultural Adjustment Act because of their importance in ensuring a stable price for wheat, the Court simply stated that "[the] activity,... *whatever its nature*, [may] be reached by Congress if it exerts a substantial economic effect on interstate commerce and this is irrespective of whether such effect is...'direct' or 'indirect.' *Id.* at 125 (emphasis added). Likewise, the Court in *Perez* did not base its decision on the effect of loan sharking on the national market for credit. Indeed, the presence of loan sharks does not affect the demand for credit in the national market, as it is typically a source of

last resort for those who have already attempted to borrow from legitimate channels. Instead, the Court in *Perez* vindicated Congress' power to regulate under the Commerce Clause by referring to the importance of loan sharking in financing organized crime, which operates on a national scale. *Perez*, 402 U.S. at 157.

Similarly, even if gun possession in schools is a local activity, when considered in the aggregate it is a national problem with nationwide repercussions. Thus, in light of the foregoing precedents, Congress' enactment of the Gun-Free School Zones Act should easily pass consitutional muster.

The devastating impact of guns on school-age children has been well documented. According to a Northeastern University study, from 1985-1990, the number of teenagers murdered by firearms doubled. GLENN L. PIERCE & JAMES A. FOX, RECENT TRENDS IN VIOLENT CRIME: A CLOSER LOOK 2-3 (1992). When combined with the number of deaths and injuries caused by suicides and accidents, the number of gun casualties among children is staggering. In 1990, nearly 5,000 children under the age of 19 were killed by gun violence--13 each day--and scores more were injured. Lois A. Fingerhut et al., *Firearm Mortality Among Children, Youth, and Young Adults 1-34 Years of Age, Trends and Current Status: United States, 1985-1990*, 231 ADVANCE DATA FROM VITAL AND HEALTH STAT. (Nat'l Center for Health Stat., Hyattsville, Md.) 12 (1993).

Unfortunately, schools do not provide a safe haven from this violence. According to the U.S. Department of Justice's National Crime Survey, about the same number of violent crimes against teenagers--approximately 500,000 each year--occur in a school building or on school property as on the street. *Annual Study Shows 3 Million Crimes on School Campuses*, SCH. SAFETY UPDATE (Nat'l Sch. Safety Center, Westlake Village, CA.) Oct. 1991, at 1. In fact, a statewide survey taken

in Illinois during the 1989-90 school year found that 44% of the students and one-fourth of the teachers surveyed indicated that their school was either *less safe or as unsafe* as the neighborhood it was in. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, TRENDS AND ISSUES 91 (1991).

Many children mistakenly believe that carrying a gun to school will protect them from this violence. According to the Centers for Disease Control, 1 in 20 high school students has carried a gun to school at least once in the past month. *Weapon-Carrying Among High School Students*, CDC MORBIDITY AND MORTALITY WKLY. REP. (CDC, Atlanta, Ga.), Oct. 11, 1991.

Children carrying guns to school is a national phenomenon, suitable for national regulation. Seven percent of New York City public high school students carry a handgun to school at least once a month, NATIONAL SCHOOL SAFETY CENTER, SCHOOL CRIME AND VIOLENCE STATISTICAL REVIEW 4 (1994), 6.6% of 11th-graders in Seattle public schools have carried a handgun to school, Charles M. Callahan & Frederick P. Rivara, *Urban High School Youth and Handguns*, 267 JAMA 3038, 3040 (1992), and 5.3% of Illinois public high school students have done so. *Annual Study Shows 3 Million Crimes on School Campuses*, *supra*, at 2. Moreover, according to Texas A&M researcher Paul Kingery, rural students are twice as likely to carry handguns to class than the national average. Donna Harrington-Leuker, *Blown Away*, THE AM. SCH. BOARD J., May 1992, at 21.

However, rather than protecting the children who carry them, guns are a grave danger to both the carriers and their fellow students. According to conservative estimates abstracted from newspaper accounts, from September 1986 to September 1990, guns in school caused 71 deaths, 201 severe woundings, and 242 hostage situations. SCHOOL CRIME AND VIOLENCE

STATISTICAL REVIEW, *supra,* at 9. Overall, shootings or hostage situations in schools have occurred in at least 35 states and the District of Columbia. *Id.*

The economic cost of these firearm injuries is substantial. According to a University of California at San Francisco study, the average cost of a firearm fatality is approximately $374,000. Wendy Max & Dorothy P. Rice, *Shooting in the Dark: Estimating the Cost of Firearm Injuries*, HEALTH AFFAIRS, Winter 1993, at 171, 177. Considering that the bulk of this cost stems from lost years of productivity, the cost of firearm fatalities among school-age children is likely to be much higher. Even firearm injuries which require only hospitalization have an average cost of $33,000. *Id.* Thus, it is reasonable to conclude that gun possession in schools has a substantial economic effect on interstate commerce.

Such a finding would not be without precedent. Indeed, the Ninth Circuit in *United States v. Evans* used general statistics documenting the number of firearm fatalities since the turn of the century to uphold a federal ban on the private possession of machine guns. *United States v. Evans,* 928 F.2d 858, 862 (9th Cir. 1991). After quoting the firearm death toll, the court found that "it was thus reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry." *Id.*

Guns in school pose a danger to students even when they are not fired. In California, one of only two states legally mandated to keep records about criminal incidents in schools, there were 1,830 armed assaults on campus during the 1988-89 school year. *Annual Study Shows 3 Million Crimes on School Campuses, supra,* at 2. This 25% increase from the previous year was fueled by a 40% increase in the prevalence of guns on campus. *Id.*

The terror caused by guns in schools endangers the

education of our youth. According to a national survey distributed by the National Association of Secondary School Principals, 37% of sixth through twelfth-graders don't feel safe in school; not surprisingly, 63% of students said they would learn more if they felt safer. SCHOOL CRIME AND VIOLENCE STATISTICAL REVIEW, *supra,* at 3. Even according to a poll commissioned by the National Rifle Association, 20% of parents surveyed said their children had expressed concerns about the presence of guns in their schools. *Id.* at 5. Alarmingly, a poll released by the Harvard School of Public Health in conjunction with the Joyce Foundation in Chicago reported that 35% of sixth through twelfth graders, in suburban, rural and urban schools, both public and private, believe that it is likely that their life will be cut short by gunfire. Mary Jordan, *Summit Searches for Cease-Fire in Violence Enveloping Children,* WASH. POST, July 22, 1993, at A3. These statistics indicate that the presence of guns in schools is distracting children from the important developmental tasks on which they should be focusing.

Gun possession in schools exerts a real impact on our students' productivity. Not only do students learn less when they are in school, but many actually drop out because of the threats to their safety. In 1992, 6% of all dropouts between the tenth and twelfth grades reported feeling unsafe at school as their reason for dropping out of school. THE NATIONAL EDUCATION GOALS PANEL, THE NATIONAL EDUCATION GOALS REPORT: BUILDING A NATION OF LEARNERS 163 (1993). Although guns alone cannot be blamed for the high drop-out rates in our nation's high schools, they are a contributing factor, and no one can deny the impact of dropouts on our economy.

For example, if the graduation rate for a group of 47 city schools--the Great City Schools, urban schools which are especially wracked by the problems of gun violence--equaled

the national average, the federal tax on the lifetime earnings of these graduates would yield enough money to double the present appropriation for elementary and secondary education, increase federal AIDS research five-fold, or boost drug prevention efforts by a factor of ten. COUNCIL OF THE GREAT CITY SCHOOLS, RESULTS 2000: PROGRESS IN MEETING URBAN EDUCATION GOALS 10-11 (1990).

Given the economic costs of gun violence in lost years of productivity, burdens on our health care system, and the disruption of our children's education, there is unquestionably a rational basis for Congress' regulation of guns in schools. This conclusion follows inexorably from the decisions of this court authorizing congressional regulation of activities, whether local or in commerce, which exert a substantial economic effect on interstate commerce.

II. THE RATIONALE BEHIND THE GOVERNMENT'S BAN OF THE PRIVATE POSSESSION OF MACHINE- GUNS VIA THE COMMERCE CLAUSE ALSO SUPPORTS THE PROSCRIPTION OF HANDGUNS BY MEANS OF THE COMMERCE CLAUSE.

A) The judicial and legislative histories concerning machinegun possession establish a nexus between machinegun violence and interstate commerce.

Congress outlawed the transfer or possession of machineguns in section 922(o) of the Firearms Owners' Protection Act.[1] 18 U.S.C. § 922(o) (1988). Congress' ban on

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[1] The Full text of Section 922(o) reads:

(1) [I]t shall be unlawful for any person to transfer or possess a

the private possession of machineguns has received few judicial challenges. In fact, the Eleventh Circuit ruling in *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), extended the statute's application to the private possession of machineguns not lawfully possessed prior to the date of enactment. *Id.* at 1042. The Ninth Circuit decision in *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991), added to the *Higgins* court's reading of section 922(o) by acknowledging the general nexus between firearms regulation and interstate commerce. The court noted the connection between the possession of firearms and the effect of such possession on the national economy. *Id.* at 862.

The court in *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), combined the Eleventh and Ninth Circuits' rulings to decide that Congress can use the Commerce Clause to ban the private possession of machineguns. In so doing, the court looked to the legislative history of section 922(o), which indicated that "Congress considered the relationship between the availability of machineguns, violent crime, and narcotics trafficking."[2] After *Hale*, it was clear that the nexus linking machinegun possession and violence to interstate commerce had been endorsed congressionally and judicially.

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machinegun.

(2) This subsection does not apply with respect to-

(A) a transfer to or by, or possession or by authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

[2] *See* H.R. Rep. No. 495, 99th Cong., 2d Sess., at 1-5, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1327-31.

B) The Fifth Circuit's failure to acknowledge a nexus between handgun possession and interstate commerce is based upon an erroneous distinction between machineguns and handguns.

Handguns and machineguns are often similar in their maximum magazine capacities, the speed of travel of their bullets, and the type of cartridges they use. Thus, if Congress has the power to regulate machineguns through the Commerce Clause, then that same power should exist for the regulation of handguns in schools. However, despite the two weapons' similarities, the Fifth Circuit in *Lopez* held that the possession of a .38 caliber handgun could not be regulated under the Commerce Clause, while endorsing the fact that machineguns can be subject to Commerce Clause regulation.

The *Lopez* court held that section 922(q) of the Act[3] does not establish a nexus between handgun possession in a school zone and interstate commerce. *Lopez*, 2 F.3d at 1368. The court distinguished section 922(q) from section 922(o) by stating, "Section 922(o) is restricted to a narrow class of highly destructive, sophisticated weapons. . . which is more suggestive of a nexus to or affect on interstate or foreign commerce than possession of any firearms whatever. . ." *Id.* at 1356.

By using this criteria to negate the extension of the commerce nexus from section 922(o) to section 922(q), the Fifth Circuit mistakenly implies that machineguns are more lethal weapons than handguns because of their "highly destructive" and "sophisticated" nature. While the two weapons may be technologically distinguishable, they both fire bullets at a similar speed and rate.

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[3] The Gun-Free School Zones Act of 1990, 18 U.S.C.A. § 922(q) (Supp. 1994).

Machineguns are different from handguns in that if the shooter pulls the trigger once, a machinegun will continue to fire its rounds as long as the trigger is compressed.[4] A semi-automatic pistol or revolver, both handguns, require the shooter to pull the trigger each time the shooter wants to fire, but does not require reloading or any other functions between trigger pulls.

Thus, the characteristic upon which the Fifth Circuit relies to keep handguns beyond the reach of the Commerce Clause essentially amounts to a slightly different rate of fire between the two guns. This slight technological distinction between the two guns should not divest Congress of the power to use the Commerce Clause to regulate the possession of handguns in a school zone.

For example, the Calico M-960A machinegun has the capacity to utilize magazines that can fire a maximum of 50 or 100 rounds. Jack Lewis, *Don't Rag the Calico*, GUN WORLD, March 1993, at 44, 46. The Calico Model 110, a handgun, utilizes 100 round rotary magazines. *1993 Gun World Annual Catalogs: Handguns*, GUN WORLD, September 1992, at 30, 32.

The similarities between handguns and machineguns are not limited to the Calico guns. The Heckler & Koch MP5 machinegun utlizes 9mm bullets. Jack Lewis, *A Family Affair in* GUN DIGEST BOOK OF ASSAULT WEAPONS 76, 80 (Jack Lewis ed., 1986). The Glock Pistol Model 17 handgun also uses 9mm bullets, in addition to its large magazine capacity of up to 19 rounds. 84 THE SHOOTER'S BIBLE 129 (William S. Jarrett ed., 1993).

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[4] The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The National Firearms Act, 26 U.S.C. § 5845(b) (1988).

The Viking machinegun has a magazine capacity of 36 rounds. Lewis, *supra* at 94. The Grendel Model P-30 handgun has a magazine capacity of 30 rounds. THE SHOOTER'S BIBLE, *supra* at 130. Lastly, the Daewoo K1A1 machinegun has a magazine capacity or either 20 or 30 rounds. Wiley Clapp, *Great To-Do with the Daewoo in* GUN DIGEST BOOK OF ASSAULT WEAPONS 82, 83 (Jack Lewis ed., 1986). The Lee Brown .38 TripleComp handgun has a maximum magazine capacity of 18 rounds. Paul Hantke, *The TripleComp*, GUN WORLD, August 1992, at 46.

These statistics indicate that machineguns are only incrementally more dangerous than handguns, for many handguns and machineguns utilize nearly the same magazine capacity. A machinegun is slightly more lethal because it requires only one compression of the trigger to fire all its bullets. However, the two guns carry nearly equal amounts of ammunition and have similar destructive capabilities, regardless of whether one gun requires separate trigger compressions for each discharge. Indeed, a .38 revolver will reload with each trigger pull and can rapidly fire its six rounds. If a nexus exists between machinegun possession and interstate commerce, then that nexus also should exist between handgun possession and interstate commerce. The *Lopez* court unwittingly based its distinction between machineguns and handguns on a slightly faster rate of fire. A machinegun that has a magazine capacity of 20 rounds is not more amenable to Commerce Clause regulation than a handgun that has a magazine capacity of 17 rounds. Congress, therefore, should have the power to ban handgun possession as defined by section 922(q) by means of the Commerce Clause.

CONCLUSION

For all of the above reasons, the Coalition to Stop Gun Violence, the Educational Fund to End Handgun Violence, and the Council of Great City Schools respectfully request that this Court reverse the Fifth Circuit's ruling and uphold the constitutionality of the Gun-Free School Zones Act of 1990.

Respectfully submitted,

Joshua M. Horwitz
Attorney

Brian J. Benner
Counsel of Record

for

Coalition to Stop Gun Violence
Educational Fund to End Handgun Violence
Council of Great City Schools

APPENDIX A

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Clerk of the United States Supreme Court
Washington, DC 20543

RE: U.S. v. Alphonse Lopez, Jr.
Case No: 93-1260, cert. granted,
April 18, 1994 **Application for extension of time to file *amicus curiae* brief or motion for leave to file *amicus curiae* brief.**

Dear Clerk:

This firm represents the Coalition to Stop Gun Violence, an organization desiring to file an *amicus curiae* brief in this case. I request an extension of the time for filing either an *amicus curiae* brief (with written consent) or a motion for leave to file an *amicus curiae* brief until June 17, 1994.

The Coalition to Stop Gun Violence is a grass-roots organization formed in 1974 as a non-profit corporation. Because of its grass-roots composition, the coalition has had difficulty locating counsel. Benner & Bilicki was just retained today.

Because of the coalition's difficulty locating counsel, they have been unable to prepare a brief. I will be out of town this weekend for the Memorial Day holiday. Therefore, I respectfully request an extension of the filing deadlines. Moreover, because of the impending deadline (presently June 2, 1994), I request that this application be considered on an emergency basis.

Thank you.

Sincerely,

/S/

Brian J. Benner
Counsel of record for
the Coalition to Stop
Gun Violence

BJB/aa

cc: all counsel of record

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 1, 1994

Brian J. Benner, Esq.
Benner and Bilicki
31700 Middlebelt Road, Suite 240
Farmington Hills, MI 48334

Re: 93-1260 - United States v. Alfonso Lopez, Jr.

Dear Mr. Benner:

This is to acknowledge receipt of your letter dated May 27, 1994, requesting an extension of time to file an amicus curiae brief in the above stated case.

An amicus curiae brief accompanied by written consent of all the parties may be file within the time allowed for the filing of the brief of the party supported. See Rule 37.3. When consent is refused, a motion for leave to file accompanied by the proposed amicus curiae brief may be presented within the time allowed for the filing of an amicus curiae brief with consent. See Rule 37.4. The Rules of this Court do not permit the filing of an application to extend the time for filing on behalf of an amicus curiae.

Very truly yours,

By

/S/
Sandy Nelsen
Assistant Clerk - Merits
(202) 479-3032

cc: Honorable Drew S. Days, III
John R. Carter, Esq.